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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

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No. 863

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE CENTRAL TRUST COMPANY OF NEW YORK (A CORPORATION), AND THE HELENA POWER AND LIGHT COMPANY (A CORPORATION),

Appellants,

vs.

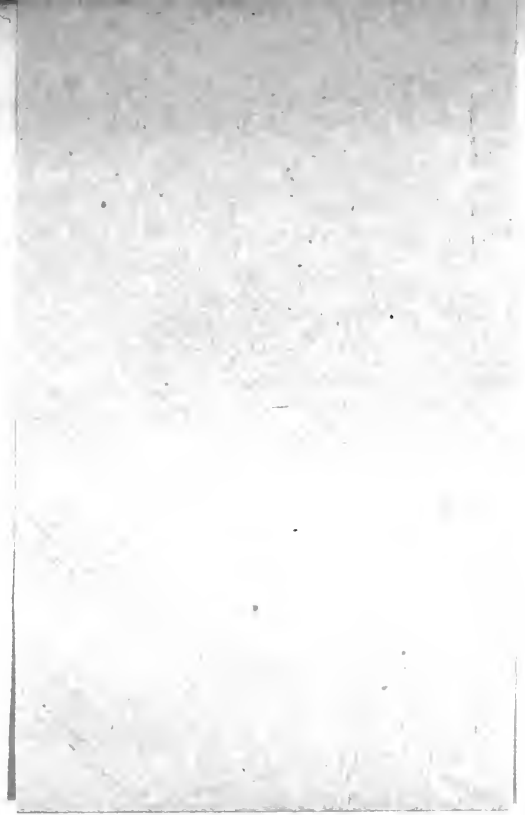
JOHN W. WARREN,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Montana.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.



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In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CENTRAL TRUST COMPANY OF NEW YORK,

Complainant,

vs.

HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,

Defendants.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between the parties to the above-entitled action, that in printing the record on appeal herein to the Circuit Court of Appeals, all and singular the description of the property mortgaged by the defendant Helena Power and Light Company to the complainant Central Trust Company, as contained in the decree, may be omitted from such record; it being understood and agreed, however, that a full copy of said decree shall be transmitted to the clerk of said Circuit Court of Appeals for use upon the hearing of said cause or otherwise.

BUTLER, NOTMAN, JOLINE & MYNDERSE, and
H. G. and S. H. McINTIRE,

Solicitors for Complainant.

T. J. WALSH and
R. R. PURCELL,

Solicitors for Defendant John W. Warren.

H. S. HEPNER,

Solicitor for Defendant, Helena Power and Light Company.

[Endorsed]: Title of Court and Cause. Stipulation as to Printing Record. Filed July 8, 1902. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Caption.

Be it remembered, that on the 15th day of October, 1901, the complainant herein filed its bill of complaint, which bill of complaint is in the words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Montana.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Montana, Sitting in Equity:

Central Trust Company of New York, a corporation created and existing under the laws of the State of New York, and a resident and citizen of the State of New York, brings this its bill of complaint against the Helena Power and Light Company, a corporation cre-

ated and existing under the laws of the State of Montana, and a resident and citizen of the State of Montana, engaged in business and owning real and other property situated in the State of Montana, and John W. Warren, a resident and citizen of the State of Montana, and thereupon your orator complains and says:

I. On and prior to the first day of January, 1895, The Helena Power and Light Company (hereinafter for brevity called the Helena Company) was, and still is, a corporation duly created and existing under and pursuant to the laws of the State of Montana, and was and is fully authorized and empowered to own the property hereinafter described, and to engage in the business for which it was formed, and to execute and deliver the bonds and mortgage hereinafter mentioned, and John W. Warren was at the time of the filing of this bill a resident and citizen of the State of Montana.

II. Your orator, Central Trust Company of New York, was at the times hereinafter mentioned, and now is, a corporation created and existing under the laws of the State of New York, and bearing the corporate name of Central Trust Company of New York, and at all times hereinafter mentioned was, and now is, duly authorized and empowered under the terms of its charter to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described.

III. On or about the first day of January, 1895, the defendant Helena company did, by a resolution duly

passed at a meeting of the trustees, duly authorize and direct the issue of 1,000 coupon bonds of one thousand dollars ($1,000) each, bearing interest at 5 per cent per annum, numbered consecutively from 1 to 1,000, both inclusive, and to secure the payment of the interest and principal of all of said bonds equally and ratably, without priority or distinction, irrespective of the date of the issue of same, by mortgage or deed of trust to your orator, as trustee, upon all the property and franchises of the Helena Company. In pursuance of such resolution and determination and in the exercise of its lawful corporate powers, and due corporate action having first been had, said defendant Helena company made and executed all of these said bonds for $1,000 each, by each of which, for value received, it promised to pay to the bearer on the 1st day of January, 1925, at the office of your orator, in the city of New York, the sum of $1,000 in gold coin of the United States of America, with interest thereon at the rate of 5 per cent per annum, payable in like gold coin on the first day of January and on the first day of July in each year, at the office of your orator, upon presentation and surrender of the coupons thereto annexed, as they severally should become due, until such principal sum should be fully paid.

IV. On or about the 1st day of January, 1895, said defendant, Helena company, in pursuance of the resolution and determination above mentioned, and in the due exercise of its corporate power, and due corporate action having first been had, in order to secure the payment of the bonds authorized to be issued and the interest

thereon as the same should be payable according to the tenor of said bonds and the coupons thereto attached, made, executed, and delivered to your orator a certain mortgage, or deed of trust, bearing date January 1, 1895, and therein and thereby granted, bargained, sold, aliened, conveyed and confirmed unto your orator, its successors and assigns, certain premises and property described in said mortgage, a copy of which said mortgage is hereto annexed, marked exhibit "A," and your orator prays that said exhibit "A" may be taken as part of this bill as if the same were set forth at length herein.

To have and to hold all and singular the said premises, lands, franchises, privileges and personal property conveyed by the said mortgage to your orator, and to its successor and successors in said trust, to its and their assigns in trust under the terms of said mortgage, for the equal pro rata benefit and security of the person or persons, firm or firms, and bodies politic which should become and be the lawful owners of said bonds and coupons, without peference to one bond over another by reason of the priority of issue, or of any act or thing whatsoever.

V. Said mortgage or deed of trust was authorized, made, executed, and delivered in all respects in conformity with law, and was duly recorded in the office of the county recorder of the State of Montana for the county of Lewis and Clarke, May 7th, 1895, at 57 minutes past 2 o'clock P. M., on page 405 of Book 12 of Mortgages.

Your orator duly accepted the trust created in and by

said mortgage or deed of trust before the recording of the same as aforesaid.

Your orator refers to said mortgage so recorded and to the true copy thereof annexed to this bill of complaint marked exhibit "A" for a particular statement of the terms and provisions of said mortgage or deed of trust, and your orator prays that said copy of said mortgage or deed of trust marked exhibit "A" may be taken in all respects as if it had been fully set forth in the body of this bill.

VI. That 425 of the bonds above mentioned, issued under and secured by said mortgage or deed of trust so made and executed as aforesaid, were duly authenticated by the indorsement thereon of the certificate of your orator as provided in said bonds and mortgage, and so authenticated were duly delivered by it, and as your orator is informed and verily believes all of said 425 bonds have been duly issued, negotiated, and sold to divers persons who have thereby become bona fide owners thereof as purchasers for value, and all are now outstanding and valid and binding obligations of the defendant Helena company. Your orator is informed and believes that the holders of said bonds are numerous, and the names and residences of many of such holders are unknown to your orator.

That in and by the terms of the mortgage securing the same, exhibit "A," it was provided that one hundred and seventy-five of said bonds should be applied exclusively to the payment and discharge of the existing bonded indebtedness of the Helena Gas Light and Coke Company

as soon as said indebtedness should mature, and that said one hundred and seventy-five bonds after being certified should remain in the hands of your orator subject to the right of the Helena company to sell the same at any time on or before sixty days prior to the maturity of said bonded indebtedness of the Helena Gas Light and Coke Company, and if sold the proceeds thereof to be paid to your orator for application as provided above, it being understood purchaser of said bonds should not be entitled to delivery of the same until the full face value had been paid into the hands of your orator. That the said one hundred and seventy-five bonds are now in the possession of your orator pursuant to the provisions above set forth, and have not been sold or delivered, and are held by your orator subject to the provisions of said mortgage, exhibit "A."

VII. The defendant Helena company made default in the payment on the first day of July, 1899, of the installment of interest due on that day on all of said bonds issued and outstanding as aforesaid and secured by the said mortgage to your orator, and the said default still continues.

Your orator is informed and believes that demand was duly made for the payment of said installment of interest due upon said bonds July 1, 1899, as aforesaid, and that the coupons representing such installment of interest, or many thereof, were duly presented for payment and payment thereof duly demanded, but the payment of said installment of interest and of said coupons was refused, and that neither on said 1st day of July, 1899, nor at any time since, has the defendant Helena Com-

pany, or anyone else on its behalf, provided at the office of your orator, or elsewhere, any funds with which to pay the said installment of interest or any part thereof, and your orator alleges that no part of said installment of interest has been paid by said defendant Helena company, or by any other person or corporation, and that the whole of said installment of interest remains due and unpaid.

Your orator further alleges that the defendant Helena company has likewise made default in the payment of installments of interest which fell due January 1, 1900, July 1, 1900, January 1, 1901, July 1, 1901, upon all the bonds issued and outstanding as aforesaid, and that such default still continues, though due demand was made for payment of said installments of interest due upon said days above set forth.

VIII. That on or about the 6th day of August, 1901, your orator gave notice in writing to the defendant Helena company of the defaults above set forth, and that pursuant to the terms of article fifth of said mortgage or deed of trust it elected to treat the whole amount of the principal of the bonds secured by said mortgage or deed of trust as forthwith due and payable, such determination, election, and notice on behalf of your orator were evidenced by a written notice thereof enclosed in a securely closed postpaid wrapper directed to the defendant Helena company as follows: "Helena Power and Light Company, Helena, Montana," and upon information and belief your orator alleges that said notice was duly received and retained by said Helena company. Your orator is informed and believes that the defendant

John W. Warren has or claims some interest in or lien upon said real property of the Helena company, but the said claim or lien, if any such there is, is subsequent to the lien of said mortgage or deed of trust.

IX. Your orator is informed and believes that the defendant Helena company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by said mortgage are of a value less in amount than the amount of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds.

Your orator further shows that the financial affairs of the defendant Helena company are in an embarrassed condition, and that there are many outstanding claims against it, as it is informed and believes; that the enforcement of such claims by seizure of the property of the defendant Helena company would result in the destruction of the business of that company, and would impair the value of its other property, and would render the security which you orator and the holders of said bonds have under said mortgage, still more insufficient than it is at present, and your orator, as trustee under said mortgage, cannot execute or perform the trusts provided therein and thereby, or protect the rights of the holders of the bonds secured thereby without the aid or interposition of this Honorable Court, sitting in equity, without a judicial sale of the mortgaged premises, franchises and appurtenances covered by the said mortgage or deed of trust, and your orator further shows that until such sale can be had and the proceeds thereof dis-

tributed, it is expedient and necessary that all said mortgaged property of every nature and description whatsoever should be placed in the possession and under the control of a receiver to be appointed by this Honorable Court, with such proper power and control over the same as to this Court may seem just.

Your orator is informed and believes that the mortgaged property constitutes and formed one single plant and property, and that it is for the benefit of all parties that it should be sold as an entirety, and that the value of it in portions or sections is, and will be, very much less than its value as a whole.

X. Your orator is informed and believes that no proceedings have been had at law or in equity for the collection of the debt secured by said mortgage or any part thereof, save only this suit.

Your orator, therefore, in view of the premises seeks the aid of this Honorable Court in equity, wherein only adequate relief can be administered in matters of this nature and prays as follows:

1. That the said mortgage dated January 1st, 1895, be foreclosed.

2. That the lien of said mortgage may be decreed and established as a lien upon the property and franchises covered thereby and mentioned therein, and that the amount due for principal and interest upon said bonds outstanding and secured by said mortgage may be ascertained and determined.

3. That in the default of the payment of the sum so found due within the time to be limited by a decree of this Honorable Court, it may be decreed that the de-

fendant and all persons claiming under it any interest in said mortgaged property as aforesaid subsequent to the lien of said mortgage, be absolutely barred and foreclosed of and from all right or equity of redemption of, in, and to said mortgaged premises, and property or any part thereof, and that a sale of the whole of the mortgaged property and premises be ordered in accordance with law and the practice of this Honorable Court, and that the proceeds may be applied to the expenses of this suit including proper attorney, solicitors and counsel fees, and to the payment of the amounts found due as aforesaid and the balance thereof as the Court may direct.

4. That if the proceeds of said sale shall be insufficient to pay the amounts due upon said bonds for principal and interest, the defendant Helena Company be adjudged liable to pay, and be required to pay, the amount of such deficiency to your orator or to the owners or holders of said bonds and coupons.

5. That a receiver be appointed to take possession of the property, estate, and franchises of the defendant Helena company, and the earnings and proceeds thereof, with power to operate the said property and to carry on the business of the defendant Helena company, and with all such power and authority as may be requisite to preserve the same until the sale thereof as the same may be decreed and ordered by this Honorable Court, and to secure the earnings and income of said property to the use of the bondholders, and with such powers and authority as are usually possessed by receivers in like cases as this Court may direct.

6. That the defendant Helena company, its officers, directors and all other persons claiming, or pretending to claim, under them and all other persons empowered may be restrained by injunction of this Honorable Court from interfering with and disposing of its plant, premises, property and franchises, or any part thereof.

7. That the defendants may answer all and singular the premises but not under oath.

8. That you orator may have such other and further relief in the premises as the nature and circumstances of the case may require and to your Honors seem meet.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill to be issued to the Helena Power and Light Company, and also a writ of subpoena to be issued to said Helena Power and Light Company and to said John W. Warren, commanding it and him, at a certain time and under a certain penalty to be therein specified, to appear before this Honorable Court then and there to answer the premises, and to abide by the order and decree of the Court therein, and that said corporation may appear herein according to law.

CENTRAL TRUST COMPANY OF NEW YORK.

[Seal] By E. FRANCIS HYDE,
Second Vice-President.

BUTLER, NOTMAN, JOLINE, and MYNDERSE,
H. G. and S. H. McINTIRE,
Solicitors for Complainant.

H. G. McINTIRE,
Of counsel.

State and County of New York,
Southern District of New York. } ss.

E. Francis Hyde, being first duly sworn, deposes and says that he is an officer, to wit, the second vice-president of the Central Trust Company of New York, the complainant in this suit; that he has read the foregoing bill of complaint; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the seal affixed to said bill is the corporate seal of said complainant, and was thereunto affixed by due and proper authority.

E. FRANCIS HYDE.

Sworn to before me this 9th day of October, 1901.

[Seal] WILLIAM A. EADIE,

Notary Public, Richmond County. Certificate filed in New York County.

Exhibit "A."

(To Bill of Complaint.)

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and ninety-five, between the Helena Power and Light Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Montana, and having its principal place of business in the city of Helena, in the county of Lewis & Clarke, State of Montana, hereinafter named the grantor, the party of the first part, and the Central Trust Company of New York, a corporation duly incorporated and existing under and by vir-

tue of the laws of the State of New York, and having its principal place of business in the city of New York, in said State of New York, and hereinafter termed the trustee, the party of the second part, witnesses:

That whereas the trustees of the said grantor at a special meeting duly and regularly called for that purpose and held at the office of said company in the city of Helena, Montana, on the twenty-sixth day of January, A. D. 1895, due and proper notice having been given of said meeting, did, by a resolution duly passed by said trustees, authorize and direct the issue of one thousand coupon bonds of said grantor of one thousand dollars each, bearing interest at five per cent per annum, said bonds to be substantially in the following form, to wit:

UNITED STATES OF AMERICA.

State of Montana.

Helena Power and Light Company.

First Mortgage Five Per Cent Gold Bonds.

No. ——— $1,000.00

For value received, the Helena Power and Light Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Montana, acknowledges it is indebted and hereby promises to pay to bearer one thousand dollars, in gold coin of the United States of America, at the office of the Central Trust Company of New York, in the city of New York, State of New York, on or before the first day of January, A. D. 1925, with interest thereon at the rate of five per cent per annum, payable in like gold coin, on the first day of January and on the first day of July of each

year, at the office of the Central Trust Company of New York, in the city of New York, State of New York, upon the presentation and surrender of the annexed coupons as they severally become due. This bond is one of a series of one thousand bonds of like tenor and date, numbered consecutively from one to one thousand, both numbers inclusive, and amounting in the aggregate to one million dollars, each of said bonds being of the denomination of one thousand dollars, the payment of which bonds is secured by a first mortgage or deed of trust, of even date herewith, executed by the said Helena Power and Light Company to the Central Trust Company of New York, of the City of New York, as trustee, conveying certain real estate, personal property and franchises in the city of Helena, in the county of Lewis & Clarke, State of Montana, said property being more particularly described in a mortgage or deed of trust securing said bonds, and it is hereby certified that all proceedings relating to this issue have been duly had and performed and that all laws of the State of Montana, in relation to said issue have been complied with.

If default be made in the payment of any installment hereon for sixty days after the same becomes due, the principal of this bond shall become due and payable upon the conditions provided in the mortgage or deed of trust securing the same.

This bond shall not become obligatory until the certificate endorsed thereon shall be signed by the trustee.

In witness whereof, the Helena Power and Light Company has caused these presents to be sealed with its

corporate seal and signed by its president and attested by its secretary, and has likewise caused a fac-simile to the signature of its treasurer to be lithographed on each of the annexed coupons this first day of January, A. D. 1895.

HELENA POWER AND LIGHT COMPANY,
By (Signed) H. M. PARCHEN,
President.

Attest:
[Seal] (Signed) H. L. WALKER,
Secretary.

(Form of Coupon.)

$25.00 $25.00

Helena, Montana, January 1, 1895.

The Helena Power and Light Company will pay to the bearer twenty-five dollars, in gold coin of the United States at the office of the Central Trust Company of New York, in the city of New York, State of New York, on the first day of A. D. , being six months' interest then due on its first mortgage bond No. ————.

(Signed) HERMAN GANS,
Treasurer.

(Form of Trustee's Certificate.)

The Central Trust Company of New York, of the city of New York, the trustee in the mortgage or deed of trust within referred to, hereby certifies that the within is one of the bonds mentioned in said mortgage or deed of trust.

CENTRAL TRUST COMPANY OF NEW YORK,
Trustee.
By ————————,

And whereas the execution of this mortgage or deed of trust has been duly authorized by the trustees of said grantor to secure the payment of the bonds so authorized to be issued and the interest thereon:

Now, therefore, this indenture witnesses that the said grantor, for and in consideration of the premises and of the sum of one dollar to it duly paid by the said trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure equally the payment of the principal and interest of the bonds aforesaid, has granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the said trustee, its successors and assigns, all of the property of the said grantor of every kind, real, personal, and mixed, wherever situated, and all the rights, privileges, franchises, immunities, income, and earnings owned or enjoyed by it, said property and property rights hereby intended to be conveyed being particularly described as follows, to wit: all those certain lots, pieces or parcels of land situate, lying and being in the county of Park and State of Montana, particularly described as follows, to wit: The north half of the southwest quarter and lots numbered one (1) and two (2) of section number fifteen (15), in township number nine (9) south of range number eight (8) east; containing one hundred and twenty-four and 79-100 (124.79) acres.

Also, all that certain lot, piece or parcel of land situate, lying and being in the city of Helena, in the county

of Lewis & Clarke, said State of Montana, particularly described as follows, to wit: Beginning at an iron pin at the intersection of the east side of Main street with the northerly boundary of the Montana Central Railway right of way in the city of Helena, Montana; thence north thirty-two (32) degrees fifty (50) seconds east two hundred and twenty-four and 3-10 (224.3) feet along the easterly side of Main Street to an iron pin; thence east two hundred and ninety-eight and 4-10 (298.4) feet to an iron pin; thence southwesterly three hundred and sixty-nine and 84-100 (369.84) feet to a stone monument; thence northwesterly three hundred and sixty-three and 1-10 (363.1) feet along the northerly boundary of the Montana Central Railway right of way to the place of beginning; all being in section number thirty (30), in township number ten (10) north of range number three (3) west.

Also all those certain lots, pieces or parcels of land situate, lying and being in Central Addition No. 3 and in the Amended Plan to Central Addition No. 3 to the city of Helena, in said county of Lewis & Clarke, particularly described as follows, to wit: Lots numbered twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19) in block number sixty-three; lots numbered thirteen (13), fourteen (14), fifteen (15), sixteen (16), and seventeen (17), and the south half of lot number twelve (12) in block number sixty-five (65); as said lots and blocks are numbered, designated and described on the plats of said Central Addition No. 3 and Amended Plan of Central

Addition No. 3 on file in the office of the county recorder of said county of Lewis & Clarke.

Also all that portion of lot number twenty (20) in said block number sixty-three (63), and all those portions of lots numbered one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13) in block number sixty-two (62), of said Central Addition No. 3, embraced within that certain tract described as follows, to wit: Beginning at a point three hundred and thirteen and 3-10 (313.3) feet south, twelve (12) degrees thirty (30) minutes west from the southeast corner of lot number thirty-seven (37) of section number nineteen (19), in township number ten (10) north of range number three (3) west, and running thence south twelve (12) degrees thirty (30) minutes west three hundred and thirteen and 5-10 (313.5) feet; thence east two hundred and seventy-eight (278) feet; thence north twelve (12) degrees thirty (30) minutes east three hundred and thirteen and 5-10 (313.5) feet; thence west two hundred and seventy-eight (278) feet to the place of beginning; said lots and blocks being as numbered, designated and described on said plat of said Central Addition No. 3.

Together with all and singular the grants made by the city of Helena, Montana, to McDonough & Co., and others of the right and privilege of manufacturing and selling gas throughout said city, and by said grantees duly assigned to the Helena Gas Light and Coke Company, and by the said Helena Gas Light and Coke Company duly assigned and transferred to the said grantor.

Also all that certain lot, piece, or parcel of land situate, lying and being in said city of Helena in the county of Lewis & Clarke, State of Montana, particularly described as follows, to wit: Beginning at a stake three (3) inches square from which the southeast corner of Government Lot number two (2) of section number thirty (30), in township number ten (10) north of range number three (3) west, bears south sixty-seven (67) degrees fifty (50) minutes east, six hundred and eighty-one and 8-10 (681.8) feet distant, and from said point of beginning running south eighty (80) degrees thirty (30) minutes, east one hundred and twenty-two and 15-100 (122.15) feet to a stake; thence north twenty (20) degrees sixteen (16) minutes east one hundred and fifty-one and 6-10 (151.6) feet to an iron pin; thence north sixty-nine (69) degrees forty-four (44) minutes west, one hundred and twenty (120) feet to a stake; thence south twenty (20) degrees sixteen (16) minutes west, one hundred and seventy-four and 2-10 (174.2) feet to the place of beginning; containing four hundred and forty-nine thousandths (.449) of an acre; said premises being bounded on the east by the right of way of the Montana Central Railway, and on the west by a street, and being the same premises conveyed to the Helena Electric Company by William A. Chessman and wife and Frank S. Getchell and wife by a deed dated June 23, 1890, and recorded in the office of the recorder of said county of Lewis & Clarke, State of Montana, on the second day of July, 1891, in book 28 of Deeds, page 175.

Also all those certain lots, pieces or parcels of land situated, lying and being in said city of Helena, in the

county of Lewis & Clarke, State of Montana, particularly described as follows, to wit: Beginning at a point in the southerly line of Cutler street, the corner between lots 54 and 55, block 2, Helena Townsite; thence running easterly along the northerly boundary line of said lot 55 eight feet; thence southerly on a line parallel with the easterly boundary line of said lot 54, said block 2, to a point on said line extended nine feet distant from the northerly boundary of lot 58, in said block 2; thence easterly to a point in the northerly boundary line of said lot 58, said block 2, thirty-three and five-tenths feet distant in an easterly direction along said northerly boundary line of said lot 58, said block 2, from the southeasterly corner of said lot 58, said block 2; thence easterly along the said northerly boundary line of said lot 58, said block 2, to the northeasterly corner thereof; thence in a southerly direction along the easterly boundary line of said lot 58, said block 2, to the southeasterly corner thereof; thence westerly along the southerly boundary line of said lot 58, said block 2, to the corner between lots 58 and 85, said block 2; thence along the southerly boundary line of said lot 85, said block 2, sixty-two and five-tenths feet; thence northeasterly to a point in the southerly boundary line of lot 53, said block 2, distant forty-seven feet from the point of intersection of the line parallel with said Cutler Street, and the boundary line between said lots 54 and 55, said block 2, extended one hundred feet distant from the point of beginning; thence northerly upon a direct line to the corner between lots 53 and 54, said block 2, thence

easterly along the northerly boundary line of said lot 54, said block 2, to the place of beginning, comprising all of lots 54 and 58 with parts of lots 53, 55, 56, and 85, block 2, Helena Townsite.

Also that other lot, piece or parcel of land situate in the Montana Central Addition, beginning at a point from which the S. E. corner of Government Lot number 2 of section number 30, in township number 10 north, range three west, bears south 49 degrees, 49′ E. 724.64 feet distant; and from said point of beginning running S. 20 degrees, 16′ W. 50 feet to the N. W. corner of the tract of ground heretofore sold by William A. Chessman and F. S. Getchell to the Helena Electric Company; thence south 69 degrees, 44′ E. 120 feet to the N. E. corner of said tract as aforesaid sold to the said Helena Electric Company; thence N. 20 degrees, 16′ E. 50 feet; thence N. 69 degrees, 44′ west 120 feet to the place of beginning, containing an area of 6,000 square feet; said premises being bounded on the west by a street to be hereafter designated and to be by the said Chessman and Getchell dedicated to the public use as a highway.

Also that certain railway and franchise situate in said city of Helena, particularly described as follows, to wit:

Beginning at the carshed on Cutler Street; thence northerly over and along Main Street to Helena Avenue; thence over and along Helena Avenue to the right of way of the Northern Pacific Railway Company; thence westerly over and along such right of way to Roberts Street; thence over and along Roberts Street to Helena Avenue.

Also beginning at the intersection of Main Street and Sixth avenue; thence over and along Sixth avenue to Fuller avenue; thence over and along said Fuller avenue to the right of way of the Montana Central Railway Company; thence over and along such right of way to Kessler Street; thence over and along Kessler Street to Lyndale avenue; thence over and along Lyndale avenue to Benton avenue; thence over and along Benton avenue to Hollins avenue; thence westerly over and along Hollins avenue to Hotel Broadwater.

Also beginning at the intersection of Main Street and Placer Street; thence over and along Placer Street to Fuller avenue; thence over and along Fuller avenue to the Montana Central Passenger Depot.

Also beginning at the boundary line between Broadwater Hot Springs Hotel property and the premises of the late Dwight G. Goodell, in the southwest quarter of the southeast quarter of section twenty-two (22) in township ten (10) north, range four (4) west, thence in an easterly direction as said railroad is now constructed, to the westerly end of Knight Street, on the westerly city limits of said city of Helena; thence easterly along Knight Street to Benton avenue; thence southerly along Benton avenue to its intersection with Park avenue; thence southerly along Park avenue to Sixth avenue; thence easterly along Sixth avenue to Allen Street; thence northerly over and along Allen Street to Seventh avenue; thence southeasterly over and along Seventh avenue to Davis Street; thence northeasterly over and along Davis Street to Eight avenue; thence easterly over

and along Eight avenue to Idaho Street; thence north along Idaho Street to Livingston avenue; thence easterly along Livingston avenue to Roberts street; thence northerly along Roberts Street to Gallatin Street; thence easterly along Gallatin Street to Sanders Street; thence northerly along Sanders Street to the passenger depot of the Northern Pacific Railroad.

Also beginning at the intersection of Winne avenue and Fee Street, in the Lenox Addition to said city of Helena, running thence westerly along Winne avenue to Lamborn Street; thence northerly along Lamborn Street to Broadway; thence west on Broadway to Montana avenue; thence north on Montana avenue to Fifth avenue; thence west on Fifth avenue to Davis Street; thence northeasterly on Davis Street to Seventh avenue.

Also beginning on Park avenue at the intersection with Sixth avenue, running thence south on Park avenue to Clark Street; thence west on Clark Street to Meagher Street; thence north on Meagher Street to the alley south of the public school grounds; thence west on said alley to Harrison avenue; thence north on Harrison avenue to Flowerree Street; thence west on Flowerree Street to Hayes avenue; thence north on Hayes avenue to Knight Street, intersecting the railroad on Knight Street at the junction of said Hayes avenue and Knight Street.

Also beginning at the intersection of Main Street and Helena avenue, running thence northerly on Main Street to Chestnut avenue; thence easterly on Chestnut avenue to Villard avenue; thence north on Villard

avenue to Custer avenue and the City limits; thence west on Custer avenue to Winne Boulevard; thence north on Winne Boulevard to near the entrance of the Helena Cemetery grounds; thence east to a point in section five (5), township eleven (11) north range three (3) west, about three hundred and thirty (330) feet east of Montana avenue; thence north to the college grounds of the Wesleyan University.

Also the houses and all machinery, engines, dynamos, wires, railroad tracks and appliances therein contained, which are erected on the right of way of the Northern Pacific Railroad Company, near Main Street, in said city of Helena, upon the ground held by the said grantor under a lease from said Northern Pacific Railroad Company to the grantor, bearing date the first day of January, A. D. 1895.

It is the intention hereby to convey all property of every kind and character owned by the grantor, whether the same be particularly enumerated and described or not, including also all property owned by said grantor within the county of Lewis & Clarke, said State of Montana, whether situate within or without the corporate limits of said city of Helena.

Together with all and singular the franchises, grants, rights, easements and privileges now owned and enjoyed by the said grantor, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and also all machinery, tanks, retorts, condensors, purifiers, holders, mains, surface pipes, meters, erections, structures, fix-

tures, engines, tools, scales, hose, manufactured and unmanufactured materials, coal, wood, and supplies of every kind on hand and stored by said grantor, and all dynamos, poles, wires, switches, rolling-stock, cars, motors, and other apparatus situate in the car-houses or round-houses along the lines or upon any of the line of said railways, or upon any of the property hereinabove described or adjacent thereto and all other property of every kind and character belonging to the said grantor whether described herein or not, and also all the estate, right, title, reversion and reversions, remainder and remainders, rents, issues, earnings, income and profits whatsoever, as well in law as in equity, of the said grantor of, in and to the said property and each and every part and parcel thereof.

To have and to hold all and singular the said premises, lands, franchises, privileges and personal property unto the said party of the second part, trustee as aforesaid, and to its successor and successors in said trust and its and their assigns in trust nevertheless under the terms hereof for the equal pro rata benefit and security of the person or persons, firm or firms, and bodies politic which shall become and be the lawful owners of the said bonds and coupons without any preference of one bond over another by reason of priority of issue or of any act or thing whatsoever.

For the further carrying into effect of this conveyance the grantor hereby appoints the trustee and its successors in the trust the attorneys of the grantor in its name and behalf to ask, demand and receive for the

grantor payment and delivery of any and all sums of money, notes, chattels, and effects assigned and transferred to the trustee by this indenture, and to give effectual releases and discharges in the name of the grantor to the party or parties making such payment and delivery, and for any or all of the purposes aforesaid or of this instrument the trustee may appoint attorney or attorneys, agent or agents, may from time to time revoke such appointment, may use the name of the grantor and jointly act in relation to the premises as it or they shall think best.

Article 1. Until default shall be made in the payment of the principal or interest of said bonds or any of them, or in the performance by the grantor of any of the covenants of the said bonds or coupons, or of this indenture, the said grantor shall possess, operate, maintain, and enjoy all the franchises, rights and property of every kind conveyed by this deed of trust and every part thereof with the appurtenances, and take and use the tolls, income, rents, issues and profits thereof in the same manner and with the same effect as if this indenture had not been made.

Article 2. If the said grantor shall well and truly pay the principal of said bonds and every one of them, and all interest thereon when the same shall become due and payable according to the meaning of these presents and of said bonds and coupons, and shall well and truly perform and keep each and all other its covenants, promises and agreements herein contained, then and thereupon all the estate, right, title, and interest of the

said trustee and its successor and successors in the trust hereby acquired shall cease and determine, otherwise this instrument shall remain in full force and effect. And whenever the bonds hereby secured shall be fully paid, principal and interest, and all of the things required of the grantor by these presents shall be well and truly performed and done, this indenture shall be discharged by the trustee or its successor or successors in the trust, and proper instruments of reconveyance to the grantor shall be executed to the grantor, its successors or assigns, if the grantor, its successors or assigns, so request in writing.

Article 3. If any default shall be made by the grantor in the payment of the interest on said bonds or any of them or any part thereof, or in the payment of the principal sum of said bonds, or any of them, or any part thereof when the same shall become due according to the tenor of said bonds and coupons and of this indenture, or if the grantor shall fail faithfully to observe and perform any of the requirements made of it by said bonds and coupons and by this indenture, and such default or failure shall continue for the space of sixty days after written notice thereof has been given by the trustee to the grantor, then and thereupon it shall be lawful for, but not obligatory upon, the said trustee to terminate and put an end to the possession of said premises by the said grantor and take possession of, operate and enjoy the said property hereinbefore described and the rents, issues, and profits thereof for the benefit of the bondholders, in which case the trustee shall be entitled to the

appointment of a receiver, having such powers and duties, and acting under such limitations, as the court making the appointment shall confer and impose; and the trustee may also, or instead of so doing, and with or without taking possession, treat the whole amount of the principal of said bonds, together with all accrued and unpaid interest, as immediately due and payable, and thereupon proceed to sell and dispose of, by one sale, or successively through several sales, all and singular the premises, property, rights, interests and franchises hereby conveyed and mortgaged or intended so to be, or such portion thereof as the trustee may deem necessary, at public auction in said city of Helena, upon such terms as to credits, partial credits and security for payment, as it may think proper or expedient, having first given public notice of the time and place of the sale or sales, by advertisement printed once a week for at least six successive weeks in some newspaper printed and published in said city of Helena, Montana, if any there be, and also twice a week for the said six weeks in some daily newspaper printed and published in said city of New York, and no other notice or demand whatsoever to or upon the grantor except the said sixty days written notice prior to the commencement of foreclosure proceedings shall be necessary. The trustee shall have the right to adjourn such sale or sales from time to time in its discretion, giving reasonable notice of each adjournment; and after so adjourning, to make the sale at the time and place to which the same may be adjourned. The trustee is hereby further authorized and empowered

in its own name or in the name of the grantor to make, execute, acknowledge and deliver to the purchaser or purchasers at such sales, good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar, both in law and equity against the grantor and all persons claiming by, through or under it from claiming the property, rights, interests, and franchises so sold or any interest therein. And for the purpose aforesaid, the trustee, and each of its successors in the trust are hereby constituted irrevocably the attorneys of the grantor. Out of the proceeds arising from such sale or sales the trustee shall first defray the expenses thereof (including its just and lawful charges for services and expenses and reasonable allowance for attorney and counsel fees), and refund any advances or expenses reasonably made or incurred by it in operating, maintaining or managing the property of the grantor while in possession, and all payments made for taxes, assessments, insurance and other proper charges upon said premises and property, the balance of said proceeds shall be paid over to and ratably among the parties holding said bonds and coupons so far as may be necessary to pay the amounts then due upon the same, including the principal and interest computed to the time of making payments; and if any of the said proceeds then remain the remainder shall be paid over to the grantor or assigns.

Article 4. And one or more of the bondholders or any person in his or their behalf may purchase the property or any part thereof at any sale made as aforesaid,

and the receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers for his or their purchase money.

Article 5. The rights of entry and sale hereinabove granted are cumulative to the ordinary remedy by foreclosure in the courts or other legal or equitable remedies by judicial proceedings, and the trustee herein or its successor or successors in this trust, upon any default being made as aforesaid, may in its discretion and upon the written request of the holders of the majority in value of the said bonds then outstanding and unpaid, shall upon being properly indemnified institute judicial proceedings to foreclose this mortgage or deed of trust, and to protect the rights of the holders of the bonds secured hereby. And in case of suit or other foreclosure proceedings the said trustee shall be entitled to recover as a part of the costs of such suit or proceeding reasonable attorney's fees to be fixed and allowed by the Court, which fee shall not exceed ten per cent on the first one thousand dollars, three per cent on the second, third, fourth and fifth thousand dollars, and one per cent on the remainder of the amount that shall be found due and unpaid on the indebtedness hereby secured. The trustee is hereby given also the right to make such foreclosure upon all of the property at one time and in one proceeding or upon portions of it successively and in separate proceedings. And the grantor hereby waives any and all rights of sale and redemption, and all other exceptions, stays or privileges now or hereafter provided by the statutes of Montana. It is further agreed that the notice hereinabove provided to be given

to the grantor shall be given by mailing such notice, postage prepaid, addressed to the said grantor at Helena, Montana.

Article 6. Before proceeding to take possession of the mortgaged property or to foreclose this mortgage or deed of trust (whether the foreclosure be made by sale under said power or otherwise), the trustee shall have the right first to exact from the bondholders reasonable indemnity against loss and liability that may be incurred by it in so doing; and upon the tender such reasonable indemnity by the owner or owners of a majority of the bonds at that time outstanding and unpaid, whether such indemnity shall have been previously requested of them or not, it shall be the duty of the trustee, in case of a default on the part of the grantor, continuing for the above-mentioned space of sixty days after written notice as aforesaid, and not waived as hereinafter provided, to take such action, pursuant to the terms of this mortgage or deed of trust, as the owner or owners of a majority of the bonds tendering the indemnity may in writing request.

Article 7. No delay or omission by the trustee in exercising the rights and powers herein granted shall be held to exhaust or impair such rights and powers, or be construed as a waiver thereof; but it is hereby mutually agreed that the holder or holders of a majority in amount of the bonds outstanding at the time of any default as aforesaid on the part of the grantor, may, by an instrument in writing, at any time, whether before or after the institution of foreclosure proceedings waive or

instruct the trustee to waive, and such default, provided always that no such action on the part of the bondholders shall extend to or be taken to affect any subsequent default, or impair the rights resulting therefrom. The trustee agrees, on any default in the payment of interest on the said bonds, to give notice thereof as aforesaid in writing to the grantor on the written request of any bondholder; and also at any time on the written request of the holder of any of said bonds, to give written notice in manner aforesaid to the grantor of any such default under this indenture, as the person requesting such notice to be given shall allege to exist.

Article 8. The trustee shall be entitled to be reimbursed for all proper outlays, of whatever sort or nature, to be incurred by this trust, and to receive a reasonable compensation for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations, and disbursements shall constitute a lien on the mortgaged property and premises. It shall not be liable or accountable for the acts, default, or negligence of any agent, or agents or attorney who may be appointed by it under or by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, if such agent or agents, or attorney, be selected with reasonable care, or for anything whatsoever in connection with this trust except willful misconduct or gross negligence, and it shall not be personally liable for any debts contracted by it for damages to persons or property, or for salaries or nonfulfillment of contracts during any period while it shall manage the trust, property or premises upon entry

as aforesaid. It shall not be bound to recognize any person or party as a holder of any said bonds, nor to take any action at his request, unless his bond or bonds are submitted for its inspection, or his ownership thereof is otherwise shown to its satisfaction; and it may, if it so desires, require the bonds so submitted to be deposited with it and retained until it shall have completed the action requested by such bondholder.

Article 9. It is further agreed that in case of the resignation, removal, or withdrawal of said trustee from the office and duties of said trust, whether at its own request or by reason of its insolvency, or from any other cause, the grantor shall have the right to nominate and appoint a successor to the said office of trustee with the consent of the owners of a majority of the bonds hereinbefore described, at the time oustanding and unpaid; and in case of such appointment, all the estate, right, title and interest in and to said property hereinbefore described as subject to this conveyance, shall vest in said newly appointed trustee, upon his or its acceptance in writing of said trust, indorsed upon this indenture, without the necessity of any other or further convey ance. But nevertheless the grantor and the retiring trustee agree to make, execute and deliver to said newly appointed trustee any further proper conveyance or conveyances, for the purpose of vesting said estate in said newly appointed trustee, which they or either of them may be requested in writing by him or it to make, exe cute and deliver.

Article 10. The grantor agrees at all times on request to furnish the trustee a schedule showing with

reasonable detail the items of the estate, property and other things covered by the lien hereof or intended so to be; and the trustee shall have the power from time to time to release from the lien of this indenture any of the property embraced therein when in its judgment other property of equal value is substituted therefor and subjected to the lien hereof, so that such release shall not injure the security or rights of the bondholders. The grantor covenants and agrees that, having possession as aforesaid, it will diligently preserve the rights and franchises now or hereafter granted to or conferred upon it by the laws of said State of Montana, or by the ordinances or laws of any city, town or municipality wherein its business is or shall be conducted; that using and operating its gas plant, electric plant and railway plant as the same are now constructed and operated, or as the same may hereafter be constructed or extended, it will at all times maintain and preserve said plants and every part thereof, together with the rolling-stock, machinery, fixtures, appliances and appurtenances in thorough repair, working order and condition, and fully supplied with motive power and equipments; and that it will from time to time make all needful and proper repairs and replacements, so that the traffic and business of the grantor shall at all times be carried with safety and dispatch. And until default as aforesaid the grantor may sell, exchange or otherwise dispose of such materials, appliances, machinery, rolling-stock or other movable property as shall have become worn out, disused or undesirable, provided it renews the same or substitutes therefor other property which in the

judgment of the trustee is of equal or greater value, the trustee's assent to such sale, exchange or other disposition to be expressed in writing, but such assent shall not be required unless the property is over twenty-five hundred dollars in value. The grantor may from time to time, as it may deem best, abandon or take up undesirable or unused portions of its railway tracks, and lay additional tracks as may be authorized by the ordinances of the city of Helena, or by the grants and franchises under which said grantor is or may be operating, but no such change shall be made without the consent of the trustee, and in all new cases all new tracks that may be laid or extensions that may be made of any of the plants hereby mortgaged shall immediately become subject to the lien of this indenture the same to all intents and purposes as if originally described herein. In no event shall the trustee be held to any liability by reason of giving any release, assent or consent mentioned in this article unless such release, assent or consent shall be given fraudulently and corruptly.

Article 11. The grantor hereby expressly covenants and agrees to pay any and all taxes, assessments, and governmental charges assessed or laid upon the property hereby laid or intended so to be, and also to keep said premises and property (except the gasworks and appurtenances) at all times insured, in insurance companies approved by the trustee, in such sums as shall reasonably protect the insurable property, payable in case of loss to the trustee as its interest may appear. In case of loss the trustee shall allow the insurance

money so received to be applied by the grantor toward the replacement of the property destroyed or injured, if the grantor so requests in writing, and shall, after such request, pay such money over to the grantor for that purpose, on receipt of proper vouchers therefor; but if the grantor should not within sixty days from the loss request in writing to have the insurance money so applied, then it shall be invested by the trustee in good securities, and form part of the trust property hereby conveyed, and shall, together with all interest and accumulations thereon, be subject to the provisions of this indenture in like manner as the other property hereby conveyed, except that the possession thereof shall be held by said trustee until the securities provided by this indenture shall be enforced.

Article 12. The grantor covenants and agrees to cause this mortgage or deed of trust to be recorded as a mortgage both of real estate and personal property, in such manner as may be required by the laws of any State in which property now or hereafter embraced in this deed may be situated, so as to preserve and protect the rights of the bondholders and all parties thereto. The grantor also agrees hereafter, from time to time during the existence of this trust and mortgage, to make, execute, acknowledge and deliver all such further instruments and conveyances as, in the opinion of the legal counsel of the trustee, may be necessary to facilitate the execution of said trust, or to further secure the rights and remedies of the holders of said bonds.

Article 13. The bonds hereby secured or intended so to be shall as soon as may be, and as fast as the same

may be required for issue, be delivered to the trustee by the grantor for issue as herein provided, that is to say: the said bonds being first certified by the trustee shall, with the coupons belonging thereto, be by it redelivered to the grantor upon the written order of the president or the grantor to the amount of four hundred and twenty-five thousand dollars thereof, to be used by the grantor in full payment for all property and rights heretofore purchased by said grantor from the Helena Gas Light and Coke Company, the Helena Electric Company, the Helena Rapid Transit Railroad and the owners of the Helena Electric Railway as follows: Two hundred and twenty-five of said bonds to the Helena Electric Company, one hundred of said bonds to the owners of the Helena Electric Railway, seventy-five of said bonds to the Helena Rapid Transit Railroad, and twenty-five of said bonds to the Montana National Bank. One hundred and seventy-five of said bonds shall be by the said trustee applied exclusively to the payment and discharge of the existing bonded indebtednes of the Helena Gas Light and Coke Company, as soon as said indebtedness shall mature. Said one hundred and seventy-five bonds, after being certified, shall remain in the hands of said trustee, subject to the right of the grantor to sell the same at any time on or before sixty days prior to the maturity of said bonded indebtedness of the Helena Gas Light and Coke Company, and if so sold the proceeds thereof to be paid to the said trustee for application as above provided, it being understood that the grantor or the purchaser of said bonds shall not be entitled to a delivery of said bonds until the full face value

of the same shall be paid into the hands of the said trustee. If said grantor shall not sell said bonds on or before sixty days prior to the maturity of said bonded indebtedness of the Helena Gas Light and Coke Company, then the said trustee shall be and is hereby authorized to sell the said one hundred and seventy-five bonds at a price not less than eighty-five cents on the dollar of the face value thereof, and apply the proceeds as aforesaid. In case of a sale of the said one hundred and seventy-five bonds as herein authorized, if the proceeds thereof shall not be sufficient to pay said indebtedness of the Helena Gas Light and Coke Company in full, the deficiency shall be paid by the grantor, and the grantor hereby agrees to pay the same. An exchange of said one hundred and seventy-five bonds, or any thereof, for the bonds of said Helena Gas Light and Coke Company, bond for bond, shall be taken and held to be equivalent to a sale of the bonds so exchanged. Each of the said bonds of the said Helena Gas Light and Coke Company, as soon as paid or exchanged, shall be canceled. The remaining four hundred of said bonds to be held by said trustee for the benefit of the grantor and to be surrendered and delivered to the executive officers (being the president and secretary) of the grantor whenever such officers shall file with said trustee satisfactory proof of expenditures for betterments—that is to say, any one or more of said four hundred bonds shall be surrendered to the grantor by said trustee whenever proof is furnished of the expenditure for betterments of a sum equal to the face of said bond or bonds so to be surrendered. Such satisfactory proof of ex-

penditures for betterments may consist of the affidavit of the president and secretary as to such expenditures, accompanied by a brief statement showing for what purposes such expenditures have been made.

Article 14. The grantor agrees that beginning with the eleventh year of the terms for which said bonds run it will pay into the hands of the trustee, as a sinking fund to provide for the payment of said bonds, twenty-five per cent of the net earnings of the grantor each year, and the amount so paid to the trustee as a sinking fund shall be by the said trustee invested in some safe investment at the best rate of interest that the said trustee can obtain, and shall be so invested as to be available for the payment of said bonds at the maturity thereof.

Article 15. The term "trustee," as employed in this instrument, shall be taken to mean the trustee hereunder for the time being, whether said party of the second part, or its successor or successors in said trust.

In witness whereof, the said party of the first part has caused these presents to be signed by its president and attested by its secretary, and its corporate seal to be affixed hereunto the day and year herein first above written.

HELENA POWER AND LIGHT COMPANY.
By HENRY M. PARCHEN,
President.

[Seal] Attest: HARRY L. WALKER,
Secretary.

Signed and sealed in presence of:
J. MILLER SMITH.

State of Montana,
County of Lewis & Clarke. } ss.

Henry M. Parchen, president of the Helena Power and Light Company, the mortgagor named in the foregoing mortgage, being duly sworn, says: That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor named in said mortgage; and the said Henry M. Parchen, on his said oath, further says that he is the president of the said Helena Power and Light Company.

HENRY M. PARCHEN.

Subscribed and sworn to before me this twenty-sixth day of January, A. D. 1895.

[Seal] J. MILLER SMITH,
Notary Public.

State of Montana,
County of Lewis & Clarke. } ss.

On this twenty-sixth day of January, A. D. one thousaid eight hundred and ninety-five, personally appeared before me J. Miller Smith, a notary public in and for said county of Lewis & Clarke, Henry M. Parchen, and Harry L. Walker, president and secretary, respectively, of the Helena Power and Light Company, to me personally known to be the individuals whose names are subscribed to the foregoing instrument as the president and secretary, respectively, of the Helena Power and Light Company, and they each of them acknowledge to me that they executed the same respectively as the presi-

dent and secretary of said company, for and on behalf and in the name of said company, as its free and voluntary act and deed, for the uses and purposes therein mentioned, and in pursuance of the order and resolution of said company directing such instrument to be executed, by signing the same as president and secretary thereof, and affixing thereto its corporate seal.

In witness thereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

J. MILLER SMITH,
Notary Public.

State of New York,
City and County of New York. } ss.

E. Francis Hyde, second vice-president of the Central Trust Company of New York, the mortgagor named in the foregoing mortgage, being duly sworn, says: That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor named in said mortgage; and the said E. Francis Hyde, on his said oath, further says that he is the second vice-president of said Central Trust Company of New York.

E. FRANCIS HYDE.

Subscribed and sworn to before me this second day of May, A. D. 1895.

[Seal] FRANK B. SMIDT,
Notary Public N. Y. Co.

State of Montana,
County of Lewis & Clarke. } ss.

I hereby certify that the within instrument was filed in my office on the 7th day of May, A. D. 1895, at 57 min. past 2 o'clock P. M., and recorded an page 405 of Book 12 of Mortgages, records of Lewis & Clarke County, State of Montana.

J. S. TOOKER,
County Recorder.
By Fred S. Yaeger,
Deputy.

Fees, $14.70.

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed and entered Oct. 15, 1901. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 18th day of October, 1901, a subpoena in equity was duly issued, which subpoena is in the words and figures as follows, to wit:

Subpoena.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting, to The Helena Power and Light Company and John W. Warren, Defendants:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 2d day of December, A. D. 1901, to answer a bill of complaint exhibited against you in said Court by Central Trust Company of New York, complainant, who is a citizen of the State of New York, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of October, in the year of our Lord one thousand nine hundred and one, and of our Independence the 126th.

GEO. W. SPROULE,
Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of December next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.

BUTLER, NOTMAN, JOLINE and MYNDERSE,
Solicitors for Complainant.

McINTIRE & McINTIRE,
New York and Helena, Montana.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the 18th day of October, 1901, and personally served the same on the 18th and 21st days of October, 1901, on the Helena Power and Light Company, by delivering to and leaving with T. A. Marlow, president of the Helena Power and Light Company, on the 18th day of October, 1901, and John W. Warren on the 21st day of October, 1901, said defendants named therein, personally, at Helena, in the county of Lewis and Clarke, in said District, a copy thereof.

Helena, October 22d, 1901.

J. P. WOOLMAN,
United States Marshal.

[Endorsed]: Title of Court and Cause. Subpoena in Equity. Filed and entered Oct. 22, 1901. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy.

And thereafter, to wit, on the 2d day of December, 1901, the answer of defendant John W Warren was filed herein, which answer is in the words and figures as follows, to wit:

In the Circuit Court of the United States, for the District of Montana.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Answer of John W. Warren.

The above-named defendant, John W. Warren, for answer to the bill of complaint herein, avers that heretofore, to wit, on the 4th day of June, 1901, in an action pending in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, wherein this answering defendant, John W. Warren, was the plaintiff and defendant herein, Helena Power and Light Company, was the defendant, judgment was by the said Court duly made, given and rendered in favor of the plaintiff herein, this answering defendant, John W. Warren, and against the said Helena Power and Light Company, defendant therein, for the sum of $2,500, together with costs amounting to $134.80, and that no part of the said judgment has

ever been paid, and that the whole thereof, together with interest at the rate of 8 per cent per annum now remains due and unpaid.

2. This answering defendant further avers that on said 4th day of June, 1901, the said judgment was duly docketed in the office of the clerk of the said District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, and still remains so docketed.

3. This answering defendant further avers that the said action was begun by this answering defendant in the said District Court on or about the 27th day of October, 1900, and that thereafter the said defendant Helena Power and Light Company appeared therein and filed its answer, and that immediately prior to the rendition of judgment therein, as hereinbefore averred, both parties appearing, the case was tried before a jury, which said jury returned a verdict in favor of the plaintiff for the said sum of $2,500, upon which verdict judgment was entered as aforesaid.

4. This answering defendant further avers that the defendant Helena Power and Light Company is, and at all times since on or about the 1st day of January, 1895, and down to the time of the filing of the complaint herein has been, engaged in operating lines of street railway in and over the streets of the city of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas lighting to the said city of Helena and the inhabitants thereof, the electric lighting being furnished by means of wires strung through the streets of the said city of Helena, and the gas through pipes and mains

laid through the streets of the said city of Helena, and that the said defendant Helena Power and Light Company has so and for such purposes occupied the said streets and conducted the said business under franchises to it granted by the said city of Helena under authority of acts of the legislature of the State of Montana, and under franchises granted by virtue of the general laws of the State of Montana.

5. And this answering defendant further avers that all of such franchises were granted to the said defendant Helena Power and Light Company since the year 1889, and that none of them were granted to or exercised by it prior to said year 1889.

6. This answering defendant further avers that all the property mentioned in the mortgage attached to the bill of complaint herein was at the time of the commencement of this action, and at all times had been, held by it, so long as it held the same, under such franchises so as aforesaid to it granted.

7. This answering defendant further avers that the liability of said Helena Power and Light Company to this answering defendant, which was the foundation of the judgment above referred to, recovered by this answering defendant against the said Helena Power and Light Company, was incurred by the said Helena Power and Light Company in the operation, use and enjoyment of the franchises hereinbefore referred to as granted to it by the said city of Helena, and that the facts constituting the said liability are set out in the complaint of this answering defendant in the action hereinbefore referred to, in which said judgment was rendered, a copy

of which complaint is hereto attached, marked exhibit "A," and by this reference made a part of this answer.

8. This answering defendant denies that the defendant Helena Power and Light Company was or could be authorized or empowered to execute or deliver any mortgage of the property mentioned in the complaint, the lien of which is or could be superior to the lien of this answering defendant's judgment; and this answering defendant denies that the lien of this defendant's said judgment is subsequent or inferior to the lien of the mortgage or deed of trust referred to in the bill of complaint.

Wherefore, this answering defendant consents to an immediate sale of the property of the said defendant Helena Power and Light Company, as prayed for in the complaint, but respectfully prays that his said judgment may be adjudged to be a lien upon the property of the said defendant company within the county of Lewis and Clarke, State of Montana, superior to the lien of the complainant's mortgage, and that it be decreed that out of the proceeds of the sale of the said property of the said defendant company the amount of the judgment of this answering defendant be first paid, together with his costs herein, and that this answering defendant have such other and further relief as to the Court may seem just.

R. R. PURCELL and
T. J. WALSH,
Solicitors for Answering Defendant.

T. J. WALSH,
Counsel for Answering Defendant.

Personal service of the foregoing answer this 30th day of November, A. D. 1901, hereby admitted.

H. G. and S. H. McINTIRE,
Solicitors for Plaintiff.

Exhibit "A."

(To Answer of John W. Warren.)

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke.

JOHN W. WARREN,
Plaintiff,

vs.

HELENA POWER AND LIGHT COMPANY (a Corporation),
Defendant.

Complaint.

The plaintiff above named complains to the Court, and alleges:

I.

That the defendant is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Montana, and during all of said time was, and still is, the owner of, and in the possession of, a certain street railway road, which is run and operated by the defendant along and upon Helena Avenue in the city of Helena, county of Lewis and Clarke, State of Montana, and other streets of said city, together with the track, rolling-stock and appurtenances thereunto belonging.

II.

That the said defendant's line of road passes along said Helena Avenue at the intersection of said Helena Avenue with Rodney Street, so-called, which said Helena Avenue and said Rodney Street are, and at all said times were, public highways of said city of Helena.

III.

That on or about the 15th day of August, 1900, in the said city of Helena, Lewis & Clarke County, Montana, plaintiff was traveling in a lumber wagon, drawn by two horses, upon said Helena Avenue, and while so traveling along said Helena Avenue, at a point about four hundred feet northeast of the intersection of said Rodney Street with said Helena Avenue, or on said Helena Avenue, plaintiff's wagon was struck by one of defendant's cars, then being negligently propelled over its said line of road by the said defendant, in consequence whereof said plaintiff was violently thrown from the seat, which he then occupied in said wagon, to the bottom thereof, with such force that he was seriously and permanently injured, his left shoulder was bruised and sprained and his breast and back were bruised and injured, by reason of which he was made sick, sore and lame.

IV.

That by reason of such injuries, plaintiff since said time has been unable to do or perform any work of any kind, and has suffered damages in the sum of five thousand dollars ($5,000).

V.

That the car which caused the injuries to plaintiff was not one which ran on schedule time, and at said time and place was being run at a negligently high and dangerous rate of speed, to wit, about twenty miles per hour, and that on approaching plaintiff as aforesaid, defendant's servants in charge of said car negligently failed to give any signal whatever of its approach, as it was their duty to do, by reason of which omission and the high and dangerous rate of speed at which such car was propelled, plaintiff was unable to get out of the way of the same, and was struck by it, as aforesaid.

Wherefore plaintiff demands judgment in the sum of five thousand dollars ($5,000), and his costs herein.

R. R. PURCELL and
T. J. WALSH,
Attorneys for Plaintiff.

State of Montana,
County of Lewis & Clarke. } ss.

John W. Warren, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled cause; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to such he believes it to be true.

JOHN W. WARREN.

Subscribed and sworn to before me this 29th day of October, 1900.

R. R. PURCELL,
Notary Public in and for Lewis & Clarke County, Montana.

[Endorsed]: Title of Court and Cause. Answer. Filed and entered Dec. 2, 1901. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of December, 1901, an order pro confesso was entered herein, which said order is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

CENTRAL TRUST COMPANY,
Complainant,
vs.
THE HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Order Pro Confesso.

The appearance of the above-named defendant, The Helena Power and Light Company, having been duly made and filed herein upon the 15th day of October, 1901, and a rule day having passed since its said appearance, and the said defendant, The Helena Power and Light Company, having failed to answer, demur or

enter any plea to complainant's bill within the time limited by the rules and practice of this Court, on motion of Messrs. Butler, Notman, Joline and Mynderse and H. G. and S. H. McIntire, solicitors for complainant, it is ordered that the bill of complaint herein filed be, and the same is hereby, taken as confessed as to said defendant, the Helena Power and Light Company.

BUTLER, NOTMAN, JOLINE and MYNDERSE,
H. G. and S. H. McINTIRE,
Solicitors and of Counsel for Complainant.

Entered this 3d day of December, 1901.

And thereafter, to wit, on the 27th day of December, 1901, a motion for decree was filed herein, which said motion is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CENTRAL TRUST COMPANY,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Motion for Decree.

Comes now the above-named complainant and moves the Court that notwithstanding and despite the answer of the defendant John W. Warren herein, that decree be rendered herein in favor of complainant, as prayed for in the bill of complaint herein.

This motion is made upon the bill of complaint and the answer of said defendant Warren.

BUTLER, NOTMAN, JOLINE and MYNDERSE,
H. G. and S. H. McINTIRE,
Solicitors for Complainant.

H. G. McINTIRE,
Of Counsel.

To R. R. Purcell and T. J. Walsh, Solicitors for Defendant John W. Warren:

You will take notice that on Monday, the 6th day of January, 1902, at the opening of court on that day, or as soon thereafter as counsel can be heard, we shall move the Court for a decree in pursuance of the prayer of the bill of complaint herein, notwithstanding the answer of the defendant John W. Warren, and that said motion will be based upon the bill and the answer of said Warren and the motion, copy of which is herewith served on you.

Helena, December 27th, 1901.

BUTLER, NOTMAN, JOLINE and MYNDERSE,
H. G. and S. H. McINTIRE,
Solicitors for Complainant.

Service of copy of the foregoing on us this 27th day of December, 1901, is hereby admitted.

T. J. WALSH and
R. R. PURCELL,
Solicitors for Defendant John W. Warren.

[Endorsed]: Title of Court and Cause. Motion. Filed and entered Dec. 27th, 1901. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of March, 1902, an order was duly made and entered, which said order is in the words and figures as follows, to wit:

67th Day of November Term, 1901, U. S. Circuit Court.

District of Montana, Monday, the third day of March, 1902.

CENTRAL TRUST COMPANY OF NEW YORK (a Corporation),
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
No. 631.

Order Denying Petition, etc.

This cause heretofore submitted to the Court upon the petition of E. T. Wilson, as receiver of the First National Bank of Helena, Montana, A. J. Davis, as trustee for the First National Bank of Butte, Montana, and William A. Clark for leave to intervene as defendants and answer the bill of complaint, and, after due consideration, it is ordered that said petition be, and the same hereby is, denied.

And said cause also came on at this time for the decision of the Court on motion of complainant for a judgment herein on the complaint and answer of J. W. Warren declaring the claim of said defendant J. W. Warren to be a subsequent lien to the lien of said mortgage or deed of trust of complainant, and after due consideration it is ordered that said motion be, and the same hereby is, denied.

And thereafter, to wit, on the 8th day of April, 1902, a final decree was made and entered herein, which said decree is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Decree.

This case came on to be heard at this term on the bill of complaint of the Central Trust Company of New York and the exhibit thereunto annexed, the same being confessed by the defendant, the Helena Power and Light Company, and an order pro confesso against said defendant having been duly entered herein on December 3, 1901, and the answer of the defendant Warren, and upon the procedings had in this cause, and was argued by counsel, and thereupon upon consideration thereof and upon motion of the complainant, Central Trust Company of New York, by its solicitors, it is found by the Court and ordered, adjudged and decreed as follows:

I. The Court finds the material allegations of the bill of complaint of the Central Trust Company of New York true.

II. On and prior to the 1st day of January, 1895, the Helena Power and Light Company (hereinafter for brevity called the Helena Company) was, and still is, a corporation duly created and existing under and pursuant to the laws of the State of Montana, and was and is fully authorized and empowered to own the property hereinafter described and to engage in the business for which it was formed, and to execute and deliver the bonds and mortgage hereinafter mentioned, and John W. Warren was at the time of the filing of this bill a resident and citizen of the State of Montana.

III. Complainant was at the times hereinafter mentioned, and now is, a corporation created and existing under the laws of the State of New York, and bearing the corporate name of Central Trust Company of New York, and at all times hereinafter mentioned was, and now is, duly authorized and empowered under the terms of its charter to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described.

IV. On or about the 1st day of January, 1895, the defendant Helena company did, by a resolution duly passed at a meeting of the trustees, duly authorize and direct the issue of 1,000 coupon bonds of one thousand dollars ($1,000) each, bearing interest at 5 per cent per annum,

numbered consecutively from 1 to 1,000, both inclusive, and to secure the payment of the interest and principal of all of said bonds equally and ratably without priority or distinction, irrespective of the date of the issue of same by mortgage or deed of trust to complainant, as trustee, upon all the property and franchises of the Helena company. In pursuance of such resolution and determination and in the exercise of its lawful corporate powers, and due corporate action having first been had, said defendant Helena company made and executed all of these said bonds for $1,000 each, by each of which for value received it promised to pay to the bearer, on the 1st day of January, 1925, at the office of complainant in the city of New York, the sum of $1,000 in gold coin of the United States of America, with interest thereon at the rate of 5 per cent per annum, payable in like gold coin, on the 1st day of January and on the 1st day of July in each year, at the office of complainant, upon presentation and surrender of the coupons thereto annexed, as they severally should become due, until such principal sum should be fully paid.

V. On or about the 1st day of January, 1895, said defendant Helena Company, in pursuance of the resolution and determination above mentioned, and in the due exercise of its corporate power, and due corporation action having first been had, in order to secure the payment of the bonds authorized to be issued and the interest thereon as the same should be payable, according to the tenor of said bonds and the coupons thereto attached, made, executed and delivered to complainant a

certain mortgage, or deed of trust, bearing date January 1, 1895, and therein and thereby granted bargained, sold, aliened, released, conveyed and confirmed unto complainant its successors and assigns, certain premises and property described in said mortgage.

To have and to hold all and singular the said premises, lands, franchises, privileges and personal property conveyed by the said mortgage to complainant and to its successor and successors in said trust, to its and their assigns in trust under the terms of said mortgage for the equal pro rata benefit and security of the person or persons, firm or firms and bodies politic which should become and be the lawful owners of said bonds and coupons, without preference to one bond over another by reason of the priority of issue, or of any act or thing whatsoever.

VI. Said mortgage or deed of trust was authorized, made, and executed and delivered in all respects in conformity with law, and was duly recorded in the office of the county recorder of the State of Montana for the county of Lewis & Clarke, May 7th, 1895, at 57 minutes past 2 o'clock P. M., on page 405 of Book 12 of Mortgages.

Complainant duly accepted the trust created in and by said mortgage or deed of trust before the recording of the same as aforesaid.

VII. That the said mortgage or deed of trust set forth in the bill of complaint herein of the complainant, Central Trust Company of New York, made by the defendant Helena company to said complainant and bearing date January 1, 1895, is a valid and subsisting mort-

gage, and constitutes a valid and subsisting lien upon the mortgaged property, premises, and franchises, subsequent only to the lien of the judgment of the defendant John W. Warren upon the real estate as follows:

[Printing of description omitted by stipulation of counsel.]

VIII. That 425 of the bonds above mentioned, issued under and secured by said mortgage or deed of trust so made and executed as aforesaid, were duly authenticated by the indorsement thereon of the certificate of complainant as provided in said bonds and mortgage, and so authenticated were duly delivered by it, and all of said 425 bonds have been duly issued, negotiated, and sold to divers persons, who have thereby become bona fide owners thereof as purchasers for value, and all are now outstanding and valid and bonding obligations of the defendant Helena company. .

That in and by the terms of the mortgage securing the same it was provided that one hundred and seventy-five of said bonds should be applied exclusively to the payment and discharge of the existing bonded indebtedness of the Helena Gas Light and Coke Company as soon as said indebtedness should mature, and that said one hundred and seventy-five bonds after being certified should remain in the hands of complainant, subject to the right of the Helena company to sell the same at any time on or before sixty days prior to the maturity of said bonded indebtedness of the Helena Gas Light and Coke Company, and if sold the proceeds thereof to be paid to complainant for application as provided above,

it being understood that the purchaser of said bonds should not be entitled to delivery of the same until the full face value had been paid into the hands of complainant. That the said one hundred and seventy-five bonds are now in the possession of complainant pursuant to the provision above set forth, and have not been sold or delivered, and are held by complainant subject to the provision of said mortgage.

IX. The defendant Helena company made default in the payment on the 1st day of July, 1899, of the installment of interest due on the day on all of said bonds issued and outstanding as aforesaid, and secured by the said mortgage to complainant, and the said default still continues.

Demand was duly made for the payment of said installment of interest due upon said bonds July 1, 1899, as aforesaid, and that the coupons representing such installment of interest, or many thereof, were duly presented for payment and payment thereof duly demanded, but that payment of said installment of interest and of said coupons was refused, and that neither on said 1st day of July, 1899, nor at any time since has the defendant Helena company, or anyone else in its behalf, provided at the office of complainant, or elsewhere, any funds with which to pay the said installment of interest of any part thereof, and no part of said installment of interest has been paid by said defendant Helena company, or by any other person or corporation, and that the whole of said installment of interest remains due and unpaid.

The defendant Helena company has likewise made default in the payment of installments of interest which fell due January 1, 1900, July 1, 1900, January 1, 1901, and July 1, 1901, upon all the bonds issued and outstanding as aforesaid, and that such default still continues, though due demand was made for payment of said installments of interest due upon said days above set forth.

X. That on or about the 6th day of August, 1901, complainant gave notice in writing to the defendant Helena company of the defaults above set forth, and that pursuant to the terms of article fifth of said mortgage or deed of trust it elected to treat the whole amount of the principal of the bonds secured by said mortgage or deed of trust as forthwith due and payable, such determination, election and notice on behalf of complainant were evidenced by a written notice thereof enclosed in a securely closed post-paid wrapper directed to the defendant Helena Company as follows:

"Helena Power and Light Company, Helena, Montana."

That said notice was duly received and retained by said Helena Company.

The claim of the defendant John W. Warren is a lien upon said real property of the Helena Company, prior to the lien of said mortgage or deed of trust.

XI. That the defendant Helena Company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by said mortgage are of a value less in amount than the amount

of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds.

XII. The amount due on said 425 bonds secured by said mortgage dated January 1st, 1895, which is in default, and which is now due and payable, is as follows:

Interest due July 1, 1899	$10,625.00
Interest thereon to date of this decree	2,351.63
Interest due January 1, 1900	10,625.00
Interest thereon to date of this decree	1,926.65
Interest due July 1, 1900	10,625.00
Interest thereon to date of this decree	1,501.67
Interest due January 1, 1901	10,625.00
Interest thereon to date of this decree	1,076.69
Interest due July 1, 1901	10,625.00
Interest thereon to date of this decree	651.71
Principal of bonds outstanding	425,000.00
Interest thereon from July 1, 1901, to date of this decree	16,291.65
	$501,925.00

That the 175 bonds provided in and by the said mortgage to be applied exclusively to the payment and discharge of the existing bonded indebtedness of the Helena Gas Light and Coke Company have not been issued, and are not outstanding obligations of the defendant Helena company, and the said bonds are not entitled to share in the distribution of the proceeds resulting from the sale of the mortgaged premises herein directed, and complainant, the Central Trust Company of New York, is hereby directed to cancel the said 175 bonds.

XIII. That the defendant Helena Power and Light Company shall, within ten days after the entry of this decree, pay, or cause to be paid, to complainant, or to the clerk of this Court, the said sum of $501,925.00, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant and secured by said mortgage dated January 1, 1895, together with the costs, counsel fees and disbursements herein incurred and allowed by the Court, and that unless said payment as hereinbefore directed shall be made within time aforesaid said mortgage be foreclosed, and all property, rights and interest conveyed thereby, and upon which said mortgage is a lien as the property is hereinbefore particularly described be sold as hereinafter directed, and that under and by said sale all equity of redemption of the defendant Helena company, and of any and all persons claiming by, through or under said defendant, of, in and to said mortgaged premises, property, rights and franchises be foreclosed and cut off and forever barred.

XIV. That the property covered by said mortgage consists of one single system and plant, and cannot be sold in separate parcels without injury to the rights of creditors, and all the parties in interest.

XV. That the property covered by said mortgage dated January 1, 1895, shall be subject to the provisions aforesaid, and in default of the sums hereinbefore found to be due and directed to be paid, be sold without valuation, appraisement or redemption, at public auction to the highest bidder or bidders on the mortgaged prem-

ises at the street-car barn at the head of Main street, in the city of Helena, Montana, on a day and hour to be fixed by the Special Master Commissioner herein appointed.

In his advertisement of sale, such day and hour to be fixed in accordance with the request of the solicitors for the complainant and previous notice of the time, place and terms of sale shall be given by publication of a brief general advertisement referring to this decree for further particulars, and for a more specific description of the property herein ordered to be sold, which advertisement shall be published at least once in each week for a term of four weeks preceding the date of the sale in one newspaper of general circulation published in the city of Helena, Montana, and by posting such notices in at least three public places in said city of Helena.

The said Special Master Commissioner may at the request of the complainant, or at the request of the solicitors for complainant, adjourn or postpone said sale, and may, without further notice or advertisement, proceed with said sale on any day to which the said sale may have been thus adjourned. The Special Master Commissioner may give such further notice of sale in addition to the notice before prescribed as he may think proper, or as said complainant may request. The complainant, or any holder or holders of bonds secured by said mortgage of January 1, 1895, may bid and purchase at said sale.

XVI. Said Special Master Commissioner shall offer for sale the entire property covered by said mortgage of January 1, 1895, as one parcel, without valuation, ap-

praisement or redemption, and shall accept no bid for said property so offered for sale from any bidder for a sum less than $200,000.00, nor from any bidder who shall not place in his hands or deposit with him at the time of making the bid as a pledge that said bidder shall make good his bid if accepted by the Court the sum of $15,000.00 in money, or certified check upon any national bank, or upon any trust company in the city of New York, or $30,000.00 par value of bonds secured by said mortgage of January 1, 1895.

XVII. That of the price for which said property shall be sold, there shall be paid in cash at the time of sale the cash deposit hereinbefore required, which shall be received as a part of the purchase price, and also from time to time thereafter such further portion of said purchase price shall be paid in cash as the Court may direct in order to meet the expenses of this suit, and to pay such claim, if any, against the mortgaged property as the Court may adjudge to be prior in equity to said mortgage. All sums of money received by said Special Master Commissioner shall be paid by him into the registry of the court. The certificate of any trust company in the city of New York that it holds bonds as therein described, subject to the order of the party named and transferred to the Special Master Commissioner, shall by him be received and accepted in lieu of bonds as a deposit at the time of sale, and on account of the payment of the purchase price bid with like force and effect as though the bonds therein mentioned had been delivered to him.

The Court reserves the right to reject any bid, and to

resell said premises and property upon the failure of any purchaser for twenty days to comply with any order of the Court requiring payment.

The balance of the purchase price not required to be paid in cash may be paid in cash, or the purchaser may satisfy and make good the balance of his bid in whole or in part, by paying over and surrendering outstanding bonds and overdue coupons appertaining thereto, secured by said mortgage dated January 1, 1895, said bonds and coupons being received at such price or value as shall be entitled to receive thereon in case the entire purchase price were paid in cash. All such bonds and coupons that may be used to make such payment shall be surrendered to the Special Master Commissioner and canceled, if the whole amount due thereon is applied upon the purchase price, but if less than the whole amount applied then the amount so applied shall be stamped or written upon said bonds or coupons, which shall then be returned to the holder.

As soon as any sale shall have been made by the Special Master Commissioner in pursuance of this decree, he shall report the same to this Court for confirmation, further certifying to the Court the compliance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed. If any bid shall be accepted by the Court and the person making the same shall fail to comply with all the conditions of sale, and all orders of the Court in respect thereto, the sum deposited by the bidder shall be forfeited, and shall be applied as the Court may direct.

XIX. That the fund arising from the sale of the prop-

erty above mentioned shall be applied as follows, and in the following order, to wit:

First.—To the payment of the costs of this suit, including all proper expenses of sale herein ordered, and such compensation as may be awarded by the Court to said Special Master Commissioner for making such sale and the compensation of the complainant for its services, charges and expenses in the execution of its trusts, fixed and allowed by the Court in the sum of six hundred dollars, and such proper allowances as the Court may make for the fees and disbursements of the solicitors and counsel for said complainant, which are hereby fixed and allowed by the Court in the sum of $5,189.25, and next to the payment of such compensation as may be allowed to the receiver appointed in this suit.

Second.—To the payment in full of the judgment of the defendant John W. Warren referred to in his answer in the sum of $2,663.89, with interest thereon to the date of payment from the date of this decree at the rate of eight per cent per annum.

Third.—The remainder of the fund derived from the sale of said properties shall be applied to the payment ratably of the interest and principal due and unpaid upon the bonds secured by said mortgage dated January 1, 1895, without preference of interest over principal.

Fourth.—Should there be any surplus after making the payments above directed the same shall remain in the registry of the Court, to abide such order or decree that the Court may make in respect thereto.

XX. That Henry N. Blake be, and he is hereby, appointed Special Master Commissioner to execute this

decree, and upon confirmation of the sale hereby ordered, and full compliance with the terms of sale by the purchaser or purchasers to make, execute, and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold, and upon the request of the purchaser or purchasers, and exhibition of the Special Master Commissioner's deed or deeds, the receiver having possession of the property sold shall make, execute, and deliver to said purchaser or purchasers good and sufficient deeds of conveyance or evidence of transfer of any and all property sold, which is vested in or standing in the name of said receiver, or to which said receiver in any manner acquired title, and shall surrender to the purchaser or purchasers possession of the property sold. And upon confirmation of said sale and compliance with the terms of sale, by the purchaser or purchasers, he or they shall be entitled to a deed or deeds of assurance to be executed according to law by the defendant Helena Power and Light Company, and the complainant Central Trust Company of New York.

Upon the execution and delivery of such deed or deeds by the Special Master Commissioner, the grantee therein shall be let into possession of the premises conveyed, and the receiver shall deliver all the premises sold which may be in his possession over to the purchaser or purchasers, or his or their successors or assigns.

The Court reserves the right in term time or chambers to appoint another person Special Master Commissioner with like powers in case of the death or disability to act of the Special Master Commissioner hereby desig-

nated, or in case of his resignation or failure to act, or removal by the Court.

XXI. That the purchaser or purchasers of the property herein decreed to be sold shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges, and franchises appertaining thereto as fully and completely as the Helena Power and Light Company now holds and enjoys, or has heretofore held and enjoyed the same, and further that said purchaser or purchasers shall have and be entitled to hold said plants, railroads, lands and other property so sold, freed and discharged of and from the lien of the mortgage foreclosed in this suit, and from the claims of the parties to this suit, or any of them.

That in case there shall be any deficiency in the payment of the amounts hereinbefore required and directed to be paid, so that such amounts shall not be paid in full, then such Special Master Commissioner shall report to the Court the amount of such deficiency, and the complainant, as trustee under said mortgage of January 1, 1895, shall have judgment against the defendant for the amount due upon the bonds secured by said mortgage, and shall have execution therefore pursuant to the rules and practice of this Court.

XXII. That the Court reserves the right at term time or at chambers to make such further judgment or order at the foot of this decree as may seem just and proper.

Dated April 8th, 1902.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and entered Apr. 8, 1902. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, 1902, the said Central Trust Company of New York and the said Helena Power and Light Company, in open court, gave notice of their intention to appeal to the Circuit Court of Appeals for the Ninth Circuit from that portion of said decree in favor of said John W. Warren, and thereupon filed herein their petition for allowance of appeal, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants,

Petition for Allowance of Appeal.

The above-named complainant, Central Trust Company of New York, and the said defendant Helena Power and

Light Company, conceiving themselves aggrieved by so much of the order and decree made and entered in the above-entitled cause on the 8th day of April, 1902, wherein and whereby it was ordered, adjudged and decreed that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the said complainant, and that the amount due upon said judgment should be paid from the proceeds of the sale of the property of the defendant Helena Power and Light Company before the payment of the amount found due upon said mortgage or deed of trust, do hereby petition for an order allowing the said complainant and the said defendant Helena Power and Light Company to prosecute an appeal from said order and decree so made and entered on the 8th day of April, 1902, so adjudging the said judgment of the defendant John W. Warren to be a prior lien to complainant's mortgage or deed of trust, and that the same shall be paid before the payment of the amount found due upon said mortgage or deed of trust, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, for the reasons specified in the assignment of errors filed herein herewith; and they pray that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of

Appeals for the Ninth Circuit, and also that an order may be made fixing the amount of security which the said complainant and defendant Helena Power and Light Company shall give and furnish upon such appeal. And your petitioners will ever pray.

CENTRAL TRUST COMPANY OF NEW YORK,
BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. and S. H. McINTIRE,

Solicitors for Complainant, Central Trust Company of New York.

H. G. McINTIRE,
Of Counsel.

HELENA POWER AND LIGHT COMPANY,
H. S. HEPNER,

Solicitor for Defendant Helena Power and Light Company.

[Endorsed]: Title of Court and Cause. Petition for Allowance of Appeal. Filed July 7th, 1902, Geo. W. Sproule, Clerk.

And thereafter to wit, on the 7th day of July, 1902, the assignment of errors was filed herein, which said assignment of errors is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Assignment of Errors.

Come now the complainant in the above-entitled cause, Central Trust Company of New York, by its solicitors, and also said defendant Helena Power and Light Company, by its solicitor, and say that in the decree of the court herein made and entered on the 8th day of April, 1902, in favor of defendant John W. Warren, and in the record and proceedings therein, there is manifest error, and file the following assignment of errors committed or happening in said cause, and upon which they will rely on their appeal from that portion of the said order and decree made and entered on the 8th day of April, 1902, in the above-entitled cause, whereby it was adjudged that

the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the said complainant, and whereby it was ordered and adjudged that the said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust foreclosed in said decree:

I.

The Court erred in denying the motion of the complainant for a decree in its favor as prayed for in its bill of complaint, notwithstanding the answer of the defendant John W. Warren, because the said answer contains and presents no defense to said bill of complaint.

II.

The Court erred in granting affirmative relief to said defendant John W. Warren upon his answer because said answer does not contain facts sufficient to entitle him to such or any affirmative relief.

III.

The Court erred in making and entering its decree in that portion thereof which adjudged that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the complainant upon the property of the defendant Helena Power and Light Company.

IV.

The Court erred in making that portion of its said decree which orders that the amount of the said judgment

of the defendant John W. Warren be paid out of the proceeds of the sale of the property of the defendant, Helena Power and Light Company, before the payment of the amount found due upon the mortgage or deed of trust of the complainant.

V.

The Court erred in holding, as it does in said decree, that the judgment in favor of defendant John W. Warren and against the defendant Helena Power and Light Company for the latter's negligent acts, which judgment was made and entered on June 4, 1901, and which is set up and relied upon by him in his answer herein, is a prior and superior lien upon the property described in and covered by the mortgage or deed of trust of the said Helena Power and Light Company to the complainant which was made and executed and delivered on January 1, 1895, and to foreclose which the present action was and is brought.

VI.

The Court erred in granting affirmative relief to the defendant John W. Warren upon his answer because in said answer the affirmative relief sought by said defendant is not pleaded or set up by cross-complaint as required by the rules of pleading in equity.

Wherefore, the said complainant, Central Trust Company of New York, and the said defendant Helena Power and Light Company pray that the portion of said decree adjudging that the said judgment of defendant John W. Warren is a prior lien to the complainant's mortgage or deed of trust upon the property therein described, and is

entitled to payment from the proceeds of the sale of such property before the payment of the amount due upon complainant's said mortgage or deed of trust, and ordering and adjudging that said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust of complainant foreclosed by said decree, and all thereof, be reversed, set aside and held for naught.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. and S. H. McINTIRE,
Solicitors for Complainant and Appellant.

H. G. McINTIRE,
Of Counsel.

H. S. HEPNER,
Solicitor for Defendant and Appellant, Helena Power and Light Company.

Title of Court and Cause. Assignment of Errors. Filed and Entered July 7, 1902. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, 1902, an order allowing appeal and fixing amount of bond was duly made and entered herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY and JOHN W. WARREN,
Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

On this 7th day of July, 1902, came the complainant in the above-entitled cause, Central Trust Company of New York, by its solicitors, and also the said Helena Power and Light Company by its solicitor, and filed herein and presented to this Court their petition for the allowance of an appeal from that portion of the order and decree made and entered in said cause on the 8th day of April, 1902, whereby it is adjudged that the judgment of defendant, John W. Warren, is a prior lien to the mortgage or deed of trust of the said complainant, and that the amount due upon said judgment should be paid from the proceeds of the sale of the property of the defendant Helena Power and Light Company, before the

payment of the amount found due upon said mortgage or deed of trust, and pray also that a transcript of the record and proceedings and papers upon which said decree was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does hereby allow the said appeal upon the said complainant and defendant Helena Power and Light Company giving a bond according to law, and the rules of the Circuit Court of Appeals in the sum of fifty-four hundred dollars, which shall operate as a supersedeas bond; and does further order that a certified transcript of the record, proceedings and papers upon which said decree, appealed from, was based or rendered, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 7th day of July, 1902.

HIRAM KNOWLES,
District Judge.

[Endorsed]: Title of Court and Cause. Order Allowing Appeal and Fixing Amount of Bond. Filed and Entered July 7th, 1902. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, 1902, the bond on appeal, duly approved, was filed herein, which said bond is in the words and figures as follows to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

CENTRAL TRUST COMPANY OF NEW YORK,
Complainant,
vs.
HELENA POWER AND LIGHT COMPANY, and JOHN W. WARREN,
Defendants.

Bond on Appeal.

Know all men by these presents, that the said Central Trust Company of New York, a corporation created and existing under and by virtue of the laws of the State of New York, by its solicitors, Butler, Notman, Joline & Mynderse and H. G. and S. H. McIntyre, and said Helena Power and Light Company, a corporation created and existing under and by virtue of the laws of the State of Montana, by its solicitor, H. S. Hepner, as principals, and Thomas A. Marlow and Henry M. Parchen, as sureties, are held and firmly bound unto the above-named defendant, John W. Warren, in the sum of five thousand four hundred dollars, to be paid to the said defendant,

John W. Warren, for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, administrators, and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of July, 1902.

Whereas, the above-named complainant, Central Trust Company of New York, and the above-named defendant, Helena Power and Light Company, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse so much of the order and decree made and entered in the above-entitled cause on the 8th day of April, 1902, by the Judge of the United States Circuit Court for the District of Montana, wherein and whereby it was ordered, adjudged and decreed that the judgment of the defendant, John W. Warren, referred to in his answer in said cause, in the sum of $2,663.89, is a prior lien to the mortgage or deed of trust of the said complainant upon the property described therein, and that the said amount due upon said judgment, with interest from the date of said decree at the rate of eight per cent per annum, should be paid from the proceeds of the sale of the property of the defendant, Helena Power and Light Company, before the payment of the amount found due upon said mortgage or deed of trust:

Now, therefore, the condition of this obligation is such that if the above-named complainant, Central Trust Company of New York, and the said Helena Power and Light Company, shall prosecute the said appeal to effect, and shall answer and pay all damages and costs that may be awarded against them if they fail to make good their said

appeal, then this obligation to be void; otherwise to remain in full force and virtue.

CENTRAL TRUST COMPANY OF NEW YORK,
By BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. and S. H. McINTIRE,
Its Attorneys.

HELENA POWER AND LIGHT COMPANY,
By H. S. HEPNER,
Its Attorney.

THOMAS A. MARLOW. [Seal]

HENRY M. PARCHEN. [Seal]

State of Montana,
County of Lewis and Clarke. } ss.

Thomas A. Marlow and Henry M. Parchen, being severally duly sworn, each for himself, says that he is one of the sureties named in and who signed the foregoing bond; that he is worth the amount named therein as the penalty thereof, over and above his just debts and liabilities and property exempt by law from execution; that he is a resident and freeholder within the State of Montana.

THOMAS A. MARLOW.

HENRY M. PARCHEN.

Subscribed and sworn to before me this 7th day of July, 1902.

[Seal] CHAS. A. SPAULDING,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

[Endorsed]: Title of Court and Cause. Bond on Appeal. The within bond is hereby approved. Hiram Knowles, Judge. July 7th, 1902. Filed and entered July 7th, 1902. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, 1902, a citation was duly issued, and served July 8th, 1902, which citation is hereto annexed:

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States to John W. Warren, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein you are defendant and appellee, and the Central Trust Company of New York, a corporation, and the Helena Power and Light Company, a corporation, are respectively complainant and appellant, and defendant and appellant, to show cause, if any there be, why the judgment and decree in said appeal mentioned in your favor and against the said Central Trust Company of New York and the said Helena Power and Light Company should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable HIRAM KNOWLES, Judge of the United States District Court for the District of Montana, presiding in the Circuit Court, this 7th day of July, A. D. 1902.

HIRAM KNOWLES,
District Judge.

Attest:
[Seal] GEO. W. SPROULE,
Clerk.

Service of the within citation and receipt of a copy thereof admitted this 8th day of July, A. D. 1902.

T. J. WALSH and
R. R. PURCELL,
Solicitors for John W. Warren, Appellee.

[Endorsed]: No. 631. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Central Trust Company of New York, Complainant, vs. Helena Power and Light Company, and John W. Warren, Defendants. Citation. Filed and Entered July 8, 1902. Geo. W. Sproule, Clerk.

Clerk's Certificate to Transcript.

United States of America, }
District of Montana. } ss.

I, George W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the fore-

going volume, consisting of 86 pages, numbered consecutively from 1 to 86, is a true and correct transcript of the pleadings, process, orders, decree, and all proceedings had in said cause, and the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed the said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirty-two 85-100 dollars ($32.85), and has been paid by appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 10th day of July, A. D. 1902.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 863. In the United States Circuit Court of Appeals for the Ninth Circuit. The Central Trust Company of New York (a Corporation), and the Helena Power and Light Company (a Corporation), Appellants, vs. John W. Warren, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed July 19, 1902.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

No. 863

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY OF NEW YORK (a corporation), and the HELENA POWER AND LIGHT COMPANY (a corporation),

Appellants,

vs.

JOHN W. WARREN,

Appellee.

APPELLANTS' BRIEF.

BUTLER, NOTMAN, JOLINE & MYNDERSE,

H. G. & S. H. McINTIRE,

Solicitors for Appellant, Central Trust Company.

H. S. HEENER,

Solicitor for Appellant Helena Power and Light Company.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, OF NEW YORK (a corporation), and the HELENA POWER AND LIGHT COMPANY (a corporation),

Appellants.

vs.

JOHN W. WARREN,

Appellee.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is an appeal from so much of a decree entered in favor of appellant, the Central Trust Company, upon the foreclosure of a mortgage or deed of trust dated January 1, 1895, made to it by the Helena Power and Light Company, as gives priority, over the claim of said appellant to a judgment entered June 1, 1901, in favor of appellee and against said Helena Power and Light Company for personal injuries. The case in the lower court was heard and determined on the bill of complaint, taken as confessed by defendant, the Helena Power and Light Company, and the answer of appellee, Warren. The facts as shown by said bill of complaint, so far as the same are

material to this appeal, are as follows: The Helena Power and Light Company is a corporation organized under the laws of the State of Montana with its place of business at Helena in that state; on or about January 1, 1895, for the purpose of securing the payment of certain coupon bonds issued by it, said Helena Power and Light Company duly executed a mortgage or deed of trust to appellant, the Central Trust Company, as trustee, the same was duly delivered and was recorded in the proper office on May 7, 1895 (the mortgage is attached to and made a part of the bill of complaint and is found on pages 13-42 of the printed record herein); of the bonds secured by said mortgage or deed of trust $425,000.00 had been issued and were outstanding at all the times hereinafter mentioned; there had been several defaults of the interest due on such bonds from January 1, 1900 down, and said Helena Power and Light Company was insolvent, whereupon, acting under the terms of the mortgage or deed of trust, the appellant, Central Trust Company of New York, on October 15, 1901, instituted this action in the Circuit Court for the District of Montana to foreclose the same and to subject the property therein mentioned to the payment of the debt secured thereby. The prayer of the bill is in the usual form. Appellee, John W. Warren, was made a party defendant to the suit, it being alleged in the bill of complaint that he "has or claims some interest in or lien upon said real property of the Helena Company, but the said claim or lien, if any there is, is subsequent to the lien of said mortgage or deed of trust" (Record p. 9). As it will be necessary to refer to said

mortgage or deed of trust, we give a brief summary of such portions of it as appear to be material. It recites that the grantor, the Helena Power and Light Company, is a corporation duly incorporated under the laws of the State of Montana and having its principal place of business at the City of Helena therein; that the issue of the bonds therein mentioned and such mortgage or deed of trust to secure the same had been duly authorized, and that all the property of the said company was thereby conveyed as such security, such property, as the description shows (Record pp. 17-26) consisted of town lots, certain grants by the city of Helena of the right and privilege of manufacturing and selling gas throughout said city, a "certain railway and franchise situate in said city of Helena" the same being described (Record pp. 22-25) and also all the personal property, enumerating the same, franchises, grants, rights, easements and privileges owned and enjoyed by the said grantor company (Record pp. 25-26), then follow the terms and conditions of said mortgage or deed of trust. Appellee Warren, was duly served with subpoena and appeared and filed his answer to said bill of complaint. Such answer is found on pages 46-53 of the printed record. Said answer (Record pp. 45-48) recites that Warren on June 4, 1901 had obtained a judgment in the State court against said Helena Power and Light Company for $2,634.80; "that the said Helena Power and Light Company is, and at all times since on or about the 1st day of January, 1895, and down to the time of the filing of the complaint herein has been, engaged in operat-

ing lines of street railway in and over the streets of the city of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas lighting to the said city of Helena and the inhabitants thereof, the electric lighting being furnished by means of wires strung through the streets of the said city of Helena, and the gas through pipes and mains laid through the streets of the said city of Helena, and that the said defendant Helena Power and Light Company has so and for such purposes occupied the said streets and conducted the said business under franchises to it granted by the said city of Helena under authority of acts of the legislature of the State of Montana, and under franchises granted by virtue of the general laws of the State of Montana.

"And this answering defendant further avers that all of such franchises were granted to the said defendant Helena Power and Light Company since the year 1889, and that none of them were granted to or exercised by it prior to said year 1889. This answering defendant further avers that all the property mentioned in the mortgage attached to the bill of complaint herein was at the time of the commencement of this action, and at all times had been, held by it, so long as it held the same, under such franchises so as aforesaid to it granted.

"This answering defendant further avers that the liability of said Helena Power and Light Company to this answering defendant, which was the foundation of the judgment above referred to, recovered by this answering defendant against the said Helena Power and Light Company, was incurred by the said Helena Power and Light

Comanpy in the operation, use and enjoyment of the franchises hereinbefore referred to as granted to it by the said clty of Helena, and that the facts constituting the said liability are set out in the complaint of this answering defendant in the action hereinbefore referred to, in which said judgment was rendered, a copy of which complaint is hereto attached, marked exhibit "A" and by this reference made a part of this answer."

Exhibit "A", the complaint in the State court in Warren vs. Helena Power and Light Company, attached to and made a part of said answer, contains the following averment (Record pp. 50-52): "That the defendant is, and at all times hereinafter mentioned, was, a corporation organized and existing under and by virtue of the laws of the State of Montana, and during all of said time was, and still is, the owner of, and in the possession of, a certain street railway road, which is run and operated by the defendant along and upon Helena Avenue in the city of Helena, County of Lewis and Clarke, State of Montana, and other streets of said city, together with the track, rolling stock and appurtenances thereunto belonging," and also other averments showing that the above judgment was rendered on a claim for personal injuries resulting from the negligent operation of the street railway of said Helena Power and Light Company upon one of the streets of the city of Helena on or about August 15, 1900.

The said answer in the foreclosure suit, further continuing contained the following (Record p. 49): "This answering defendant denies that the defendant Helena

Power and Light Company was or could be authorized or empowered to execute or deliver any mortgage of the property mentioned in the complaint, the lien of which is or could be superior to the lien of this answering defendant's judgment; and this answering defendant denies that the lien of this defendant's said judgment is subsequent or inferior to the lien of the mortgage or deed of trust referred to in the bill of complaint.

"Wherefore, this answering defendant consents to an immediate sale of the property of the said defendant Helena Power and Light Company, as prayed for in the complaint, but respectfully prays that his said judgment may be adjudged to be a lien upon the property of the said defendant company within the County of Lewis and Clarke, State of Montana, superior to the lien of the complainant's mortgage, and that it be decreed that out of the proceeds of the sale of the said property of the said defendant company the amount of the judgment of this answering defendant be first paid, together with his costs herein, and that this answering defendant have such other and further relief as to the Court may seem just."

The bill of complaint was taken as confessed by the defendant Helena Power and Light Company, and as to defendant Warren a motion for a decree, notwithstanding his said answer, was made (Record pp. 54-55.) This motion the Circuit Court denied (Record p. 56.) And afterwards a decree was entered herein (Record pp. 57-72.) Such decree recites, *inter al.*, (Record pp. 60-61):

"That the said mortgage or deed of trust set forth in the bill of complaint herein of the complainant, Central

Trust Company of New York, made by the defendant Helena Company to said complainant and bearing date January 1, 1895, is a valid and subsisting mortgage, and constitutes a valid and subsisting lien upon the mortgaged property, premises and franchises, subsequent only to the lien of the judgment of the defendant John W. Warren upon the real estate as follows;" and (Record p. 63): "The claim of the defendant John W. Warren is a lien upon said real property of the Helena Company, prior to the lien of said mortgage or deed of trust," and after ordering a foreclosure of said mortgage or deed of trust and a sale of the property therein mentioned, it provides that from the proceeds of such sale, after deducting the costs of the foreclosure suit and before payment of any portion of the judgment found in favor of appellant, Central Trust Company.

"Second.—To the payment in full of the judgment of the defendant John W. Warren referred to in his answer in the sum of $2,663.89, with interest thereon to the date of payment from the date of this decree at the rate of eight per cent per annum" (Record p. 69.)

Thereupon the appellants duly perfected this appeal from such part of said decree whereby it was adjudged that the claim of appellee was a prior lien to the said mortgage or deed of trust, and whereby it was ordered that said claim of appellee should be paid from the proceeds of a sale of the mortgaged property before the payment of the amount found due upon said mortgage or deed of trust. The assignment of errors is contained on pages 75-78 of the printed Record, and is as follows:

"Come now the complainant in the above entitled cause, Central Trust Company of New York, by its solicitors, and also said defendant, Helena Power and Light Company, by its solicitor, and say that in the decree of the court herein made and entered on the 8th day of April, 1902, in favor of defendant John W. Warren, and in the record and proceedings therein, there is manifest error, and file the following assignment of errors committed or happening in said cause, and upon which they will rely on their appeal from that portion of the said order and decree made and entered on the 8th day of April, 1902, in the above entitled cause, whereby it was adjudged that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the said complainant, and whereby it was ordered and adjudged that the said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust foreclosed in said decree:

I.

"The court erred in denying the motion of the complainant for a decree in its favor as prayed for in its bill of complaint, notwithstanding the answer of the defendant John W. Warren, because the said answer contains and presents no defense to said bill of complaint.

II.

"The court erred in granting affirmative relief to said defendant John W. Warren upon his answer because said

answer does not contain facts sufficient to entitle him to such or any affirmative relief.

III.

"The court erred in making and entering its decree in that portion thereof which adjudged that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the complainant upon the property of the defendant Helena Power and Light Company.

IV.

"The court erred in making that portion of its said decree which orders that the amount of the said judgment of the defendant John W. Warren be paid out of the proceeds of the sale of the property of the defendant, Helena Power and Light Company, before the payment of the amount found due upon the mortgage or deed of trust of the complainant.

V.

"The court erred in holding, as it does in said decree, that the judgment in favor of defendant John W. Warren and against the defendant Helena Power and Light Company for the latter's negligent acts, which judgment was made and entered on June 4, 1901, and which is set up and relied upon by him in his answer herein, is a prior and superior lien upon the property described in and covered by the mortgage or deed of trust of the said Helena Power and Light Company to the complainant, which was made and executed and delivered on January 1, 1895, and to foreclose which the present action was and is brought.

VI.

"The court erred in granting affirmative relief to the defendant John W. Warren upon his answer because in said answer the affirmative relief sought by said defendant is not pleaded or set up by cross-complaint as required by the rules of pleading in equity.

"Wherefore, the said complainant, Central Trust Company of New York and the said Helena Power and Light Company pray that the portion of said decree adjudging that the said judgment of defendant John W. Warren is a prior lien to the complainant's mortgage or deed of trust upon the property therein described, and is entitled to payment from the proceeds of the sale of such property before the payment of the amount due upon complainnat's said mortgage or deed of trust, and ordering and adjudging that said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust of complainant foreclosed by said decree, and all thereof, be reversed, set aside and held for naught."

ARGUMENT.

I.

Upon the argument of the motion for judgment in favor of appellant Central Trust Company notwithstanding the answer of appellee, Warren, (Record pp. 54-55) it was conceded by the latter's counsel that appellee was not entitled to relief by reason of the provisions of section 707 of the Compiled Statutes of 1887 of the State of Montana

which section has been retained and is now section 914 of the Civil Code of that state, found in the chapter relating to railroad corporations, and which reads: "Section 914. A judgment against any railroad corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shal be prior and superior to the lien of any mortgage or truse deed provided for in this chapter," in view of the decision of this Court in Massachusetts Loan and Trust Company vs. Hamilton, 88 Fed. 589 in which it was held that such section had no application to street railways nor to corporations operating the same, but that he would base his right to recover upon the provisions of section 17 of Article XV of the Montana Constitution, which reads as follows:

"Section 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

It was upon this contention that said motion was submitted. The Judge of the Circuit Court in overruling the motion filed no written opinion but said that he did not consider that said section of the Montana Constitution had any application; that the present case was distinguishable from the Hamilton case (88 Fed. 589) in that the

Helena Power and Light Company was a Montana corporation, necessarily incorporated under the statutes of that state relating to the incorporation of railroad corporations, as there was no other law in that state prior to the adoption of the Civil Code, which was approved February 19, 1895, under which a corporation to transact a street railway business could be organized, and that consequently said Helena Power and Light Company and its property was subject to all the laws of the state, relating to railroad corporations, including said section 707 of the Compiled Statutes of 1887. He also further stated that there was enough in the bill of complaint to show that said defendant company was incorporated under the railroad laws of the State.

In submitting our views to this Court we shall contend, first, that the defendant Helena Power and Light Company is not a railroad company, but is one authorized by the general incorporation laws of the state in force prior to July 1, 1895, relating to corporations for industrial and productive purposes, that said section 707 of the Compiled Statutes of Montana has no application to the case, in short, that the case is not distinguishable from the Hamilton case *supra*, second that section 17 of Article XV of the Montana Constitution has also no application, and third that the judgment appealed from is erroneous and should be reversed.

First. There is no dispute as to the validity of the mortgage or deed of trust to foreclose which the present action was instituted nor of the fact that the grantor therein named, the Helena Power and Light Company,

was at the time of its execution and delivery a duly incorporated company under the laws of the State of Montana. It is further expressly averred in the answer of appellee, Warren, (Record p. 47) "that the defendant Helena Power and Light Company is, and at all times since on or about the 1st day of January, 1895, and down to the time of the filing of the complaint herein has been, engaged in operating lines of street railway in and over the streets of the city of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas lighting to the said city of Helena and the inhabitants thereof," and it is further expressly averred in said answer (Record pp. 50-52) that the act constituting the basis of appellee's claim arose from the negligent operation of its said street railway line subsequent to said mortgage or deed of trust. Prior to July 1, 1895 the laws of Montana relating to the forming of incorporations were embodied in the Compiled Statutes of 1887. Section 446 p. 724 of those statutes after enumerating certain purposes for which corporations might be formed, and which do not in express terms include either the manufacture or furnishing of gas, electricity or the operation of street railways, provided that any three or more persons might form a company for the purpose of "carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business." The statutes of Montana then in force relating to the formation of railroad corporations were contained in Chapter XXXV (erroneously designated XXV) on pages 807-824 of such Com-

piled Statutes. Section 677 p. 808 of such statutes reads: "Any number of natural persons, not less than five, may become a body corporate for the purpose of locating, constructing, maintaining, and operating railroads with all the rights, privileges and powers conferred by, and subject to all the restrictions of, this chapter," and section 678 p. 809 contains the following: "That any number of persons as aforesaid, asociating to form a corporation for the purposes named in section 677 of this chapter, shall under their hands and seals make a certificate which shall specify as follows:

First. The name of such corporation, by which it shall be known.

Secondly. The name of the county or counties, and territory or territories, where the termini of said road are to be located, and the county or counties, and territory or territories, through which such road shall pass and the general route of said road.

Thirdly. The amount of capital stock necessary to construct such road."

The only provisions of the law of Montana then in force relating in any way to street railways *co nomine* were section 12 of Article XV of the Constitution which reads: "No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad" and subdivisions XIV and XVI of section 325, p. 683, of the Compiled Statutes relating to Municipal Corporations, which empower city councils:

"XIV. To regulate and control the laying of railroad tracks and prohibit the use of engines and locomotives propelled by steam, or to regulate the speed thereof when used."

"XVI. To license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established."

The aforesaid statutes of Montana relating to railroad corporations, and especially those numbered sections 702 to 707 inclusive, were carefully and fully analyzed and explained by this Court in the case of Massachusetts Loan & Trust Co. vs. Hamilton, 88 Fed. 593-595 and were shown not to be applicable to corporations formed for the purpose of operating street railways.

See also Board of R. R. Comr's vs. Market St. Ry. Co. (Cal.) 64 Pac. 1065.

Ferguson vs. Shurman, 116 Cal. 169 s. c. 47 Pac. 1023.

Now in this case we have not a corporation formed for that purpose alone, but one which included in its business objects also, as is averred in appellee's answer, the "furnishing of electric and gas lighting to the said city of Helena and the inhabitants thereof" (Record p. 47.) Certainly there is nothing in the bill of complaint which can justify the conclusion that the defendant company was formed under the railroad corporation acts, but much from which the contrary is inferable. Indeed,, as to this very corporation the Supreme Court of the state in State vs. Helena Power and Light Company, 22 Mont., 393-394

decided in 1899, had the following to say: "It does not appear that the charter of respondent or the statute under which it was organized requires it to maintain or operate a line of railway; nor is it claimed that the State has delegated to respondent the right to exercise the power of eminent domain. It does not appear indeed whether it owes its existence to a special act of the legislature or to a compliance with the terms of some general act authorizing the formation of corporations thereunder. At the argument the statement was made that respondent was organized and exists under Chapter XXV, Division 5, Compiled Statutes of 1887, entitled 'Corporations for Industrial or Productive Purposes,' but nothing contained in that chapter may be so interpreted as to impose upon the respondent the obligation to continue the operation of any portion of its system of railways."

If the Supreme Court of Montana had regarded this as a railroad corporation, it must be assumed, it would have granted the mandamus sued for in that case, for it is a settled rule that a railroad corporation may be compelled by mandamus to operate its line.

3 Cook on Corporations (4th Ed.) Sec. 903.

It could not have been formed under any special act of the legislature for the granting of private charters was forbidden to the territorial legislature by the Organic Act,

U. S. Rev. Stat., Sec. 1889;

and to the state legislature by the constitution,

Article V, Sec. 26 and Article XV, Section 2.

As the record shows it was organized under the laws of

the State of Montana. (Record pp. 3, 48, 50.) The conclusion, therefore, of the learned Circuit Judge that said company was formed under said railroad incorporation acts is clearly not supported by the facts before the court.

Under what law of Montana, in force prior to July 1, 1895, could such a company as this one formed for the purposes aforesaid, have been incorporated? The answer, we submit, is plain; that relating to incorporations for industrial and productive purposes, as enumerated in section 446 of the Compiled Statutes, above quoted. This statute was before the Supreme Court of Montana in 1888 and was then construed, that court saying:

"The defendant further alleges that plaintiff (appellant) is a corporation duly organized under the laws of Montana Territory, * * * * The answer denies all the allegations of the complaint, and denies that plaintiff is a corporation, or that it has legal capacity to sue defendant. The cause was tried by the court without a jury. Upon the trial of the issues thus raised by the pleadings, the plaintiff offered in evidence the articles of incorporation of the Carver Mercantile Company, duly certified by the secretary of the territory; also copy of same articles duly certified by the County Clerk of Gallatin County as correct, and as being of record in the recorder's office of that county. Counsel for defendant objected to the introduction of said articles in evidence. The court sustained the objection, and refused to admit said articles in evidence. After the evidence on both sides was completed, the court filed its written findings of fact and conclusions of law, which, briefly stated, were

that the defendant was personally liable on the bill sued for; but the plaintiff was not competent to sue, not being a corporation created by law; the territorial leigslature not having the power under act of Congress to provide by law for the formation of trading or mercantile corporations. This is the only question presented by the record; and the appeal is prosecuted for the purpose of having this question determined. Section 1889 of the Revised Statutes of the United States, as far as it relates to the legality of the corporation now under consideration, is as follows: "The legislative assemblies of the several territories shall not grant private charters or especial privileges; but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, or other industrial pursuits." The legislature of the territory, acting under the limitation contained in this law, or intending to act under its limitation, in 1872 passed a law for the formation of corporations for industrial or productive purposes. Without reciting at length the first section of this act, it enumerates many of the purposes for which corporations may be formed, and among these trading and commercial corporations are not mentioned; but a general clause contained in the section authorizes the formation of corporations for "carrying on any other branch of business designed to aid in the industrial or productive interests of the country, and the development thereof." It is presumed that the corporation plaintiff, if it has any legal or corporate existence, was formed under this general provision of the act above referred to.

We know of no other law of the territory under which it could be formed, and the question recurs whether a corporation for mercantile purposes was authorized under this act. And this, in its turn, involves the validity of the act of the legislature, and whether it contravenes the act of Congress referred to. We are referred to only one case in the briefs on either side in which the words "industrial pursuit" have received judicial construction. This was the case of Wells, Fargo & Co. vs. Railway Co., 23 Fed. Rep. 469, decided in the United States Circuit Court for Oregon, in which it was held that the express business is an "industrial pursuit," and one which the territorial legislature could provide for the formation of corporations to engage in. It would be somewhat difficult to say in what respect an express business is an industrial pursuit and a mercantile business is not. "Industry" is defined by lexicographers to be "Habitual diligence in any employment, either bodily or mental;" and "industrial" as consisting in or pertaining to industry. These definitions are surely as applicable to the sale of goods, which is the chief business of a merchant, as to the transportation of goods, which is the chief business of an express carrier. They are alike "industrial," and if the legislature could authorize the formation of a corporation for one of these purposes it could for the other."

Carver Mercantile Co. vs. Hulme, 7 Mont., 571.

Surely if a corporation formed for mercantile purposes or for the expres business is one authorized under the power contained in the words "or of carrying on any other branch of business designed to aid in the industrial

or productive interests of the country and the development thereof" then one formed for manufacturing and furnishing gas, electricity and operating a street railway must also be one. It is conceded that this corporation has and had a legal status. It could not have been formed under the railroad incorporation acts as the furnishing of gas, electricity and street railway facilities are clearly *ultra vires* of railroad corporations, 1 Wood on Railroads, Secs. 169-170; necessarily therefore it must have been formed under section 446, *supra*. The maxim *ut res magis valeat quam pereat* is applicable. And consequently it follows that section 707 of the Compiled Statutes under the interpretation placed upon it in Massachusetts Loan & Trust Co. vs. Hamilton 88 Fed. 589 has no application to this corporation nor to the case at bar, and appellee is not entitled to any relief by reason of it. The reasons which might be advanced for the enactment of such a statute as said section 707 are utterly absent when applied to the business of a gas or electric company, and yet by reason of the part of the decree appealed from not only is the street railway property of the defendant company subjected to the claim of appellee but also all its other property.

Second. Is appellee entitled to relief by reason of section 17 of Article XV of the Constitution of Montana? From the passages, quoted above, of the appellee's answer it will appear that he is attempting to deduce the conclusion that because the defendant, the Helena Power and Light Company, in conducting the various branches of its business under permission, or as he calls them "fran-

chises" from the city of Helena to occupy portions of certain streets of said city, such "franchises" and the property used in connection therewith are not transferable except in subordination to claims against the company which were not only in existence at the time of such transfer but which might thereafter come into existence. What is the nature of such "franchises" from the city? In Montana a municipal corporation may not create corporations, it may not grant a franchise to be a corporation but it may under the terms of section 12 of Article XV of the Constitution give its *consent* to the occupancy of its streets by street railways, and under subdivison XVI of section 325 of the Compiled Statutes of Montana it might "license and authorize the construction and operation of street railroads." Such privilege was held by the Supreme Court of Montana in State ex rel Knight vs. Helena Power and Light Company, 22 Mont., 391 to be in the nature of a license or permission merely and not the granting of a franchise which imposed upon the grantee the legal duty to maintain and operate its property and the case of San Antonio St. Ry. Co. vs. State, 90 Tex., 520, 35 L. R. A. 662, was there cited with approval.

"A distinction is to be made between a street railway franchise granted by the legislature, and the permission of a municipality to the occupation of the streets by a railway company; the latter is not a franchise but a license which may be forfeited or abandoned."

23 Am. & Eng. Ency. of Law, 977.

Galveston City Ry. Co. vs. Galveston St. Ry. Co. 63 Tex. 529.

Chicago City Ry. Co. vs. People, 73 Ill. 541.

Belleville vs. Citizens Horse R. Co., 152 Ill. 171.

People vs. Rome W. & O. R. Co., 103 N. Y. 106.

Northern P. Ry. Co. vs. Washington, 142 U. S. 498.

Permission conferred on a street railway company to use streets is a mere license.

Atchison St. Ry. Co. vs. Move 17 Pac. 587.

It is well settled that "there is a distinction between the different classes of railroad franchises. The franchise to be a corporation is not the subject of sale and transfer, unless the law by some positive provision made it so, and pointed out the modes in which such sale and transfer may be affected. But the franchises to build, own and manage a railroad and take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons and there is nothing in their nature inconsistent with their being assignable."

New Orleans &c. R. R. Co. vs. Delamona, 114 U. S. 507-508.

The franchise or right to build, own and manage a railroad and take tolls thereon being asignable, the limitation on the power of the legislature contained in section 17 of Article XV of the Montana Constitution, it is submitted, applies only to corporate rights as are not generally held to be the subject of transfer, i. e. the right to be a corporation and the right to transact business as such. Such rights, privileges, franchises, if you please, as those granted by the city of Helena, and the property used in connection with the same, could not have been within the

intent of such section as otherwise it would be applicable to a transfer of its property by any corporation, e. g. one for mining or irrigation purposes, or for any purposes permitted by the incorporation statutes of the state. But it is clear that the section in question could have no application to such facts as we have in this case. It relates at most to liabilities which had their existence, which were "contracted or incurred" at and prior to the time of the transfer. To give it the meaning contended for by appellee there would have to be read into it some such phrase as the following: "or which may thereafter be contracted or incurred." But to do this would violate one of the cardinal rules of construction, which in Montana is crystallized into a statute, namely, section 3134 of the Code of Civil Procedure, "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted."

In the construction of a constitution the same rule applies as in the construction of statutes. The Supreme Court of the United States in Webster vs. Cooper 14 How. 504 says:

"The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the state, and its de-

cision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and this Court receives such a settled construction as part of the fundamental law of the state."

See also People vs. Potter 47 N. Y. 375.

"A constitution should be construed according to the natural and most obvious import of the language used therein."

Rassmussen vs. Baker, 50 Pac. 821 and cases cited.

Law vs. People, 87 Ill. 385.

Martin vs. Hunter, 1 Wheat. 304.

It is not a violent presumption to suppose that if the makers of the Montana constitution intended by it to deprive a person of property and property rights acquired in 1895 by a subsequent act of omission or commission had in 1901, not by the owner of such property but by his grantor, then they would have said so in unmistakable language, and in the absence of it it cannot be assumed. Persuasive evidence that the legislature did not so construe the section in question is found in the fact that the legislature in the adoption of the Civil Code re-enacted section 707 of the Compiled Statutes as section 914 of the Civil Code. There was no necessity for this if the constitutional section is susceptible of the construction contended for by appellee.

Somewhat in point is the construction placed upon the statute, Code section 1255, of North Carolina, which provides that mortgages of incorporated companies upon their property or earnings, whether in bonds or other-

wise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in courts of this state against such corporation for labor performed or material furinshed such corporation, nor for torts committed by such corporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding. Referring to it the Supreme Court of that state in Antietam Paper Co. vs. Chronicle Pub. Co., 115 N. C. 143 20 S. E. Rep. 366 says:

"Several of the creditors claimed priority over the above mentioned mortgagee under section 1255 of the Code. They insist that the articles in question (paper, ink, gas, a cut of Santa Claus, and the like) are "materials furnished" within the above provision. Without discussing the various authorities cited on the argument, we are content to adopt the construction placed upon the statute by this court in Traders Nat'l Bank vs. Lawrence Manuf'g Co., 96 N. C. 298, 3 S. E. 367. The court said: "We are disposed to concur in the view of counsel for the appellant, Hall, that the section so far as it relates to claims for labor performed or material furnished, pursuing very nearly the words used in section 1781 was designed by its disabling effect, to more effectually secure the liens given by the constitution to the laborer (article 10, sec. 4,) and the statute extended the lien to materials furnished; but the lien is further extended to torts, and compensation is provided against any alienation attempted to defeat the claim. After holding that, under the cir-

cumstances of that case, machinery or other articles purchased abroad, and used in putting up a mill or facilitating its working afterwards" was not within the act, Smith, C. J., remarked that "the consequences would be pernicious and destructive of all fair and safe dealings with corporations, if a secret lien founded upon a sale by a distant creditor, of which a person had no information, or means of information provided by law, could be set up as paramount to his demand; and unless imperatively demanded, such a construction ought not to be put upon an enactment as will lead to this result. We have examined the numerous authorities to which we have been referred by counsel, but they do not, in our opinion, sustain the contention that the articles furnished by the appellants are embraced by the statue. It is sufficient to say that these articles, which in no sense are attached to or enhance the value of the property, cannot be considered as within the spirit or letter of the act." This ruling was affirmed in Heath vs. Big Falls Cotton Co. 115 N. C. 202, 20 S. E. Rep. 369. In that case the prior mortgage was held a valid prior lien over claims for property sold and delivered to the mortgagor company, the court says:

"His honor was also correct in his ruling that the debts of the plaintiffs and others, arising from cotton and flour sold and delivered to the defendants, are not entitled to priority over the said mortgage. Antietam Paper Co. vs. Chronicle Pub. Co. (at this term) 20 S. E. 366."

But much more directly in point is the case of Klosterman vs. Mason Co. C. R. R., 8 Wash. 281, 36 Pac. 136. The constitutional provision there referred to is Article XII, Sec. 8 of the Washington Constitution, which reads:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

The facts of that case were substantially as follows: Klosterman had a claim for goods sold and delivered to the corporation (one formed to build and operate a railroad and to carry on a general lumbering and sawmill business) prior to July 20, 1891, and on that day he began an action against it for the same. Prior to this date the corporation had mortgaged its property to one Mason and on July 27, 1891 in consideration of its mortgage debt and of $1,200 sold and conveyed its property to him. When this conveyance was made the corporation owed other parties including Klosterman, but of that fact Mason had no knowledge. On this state of facts Klosterman among other things contended that the sale to Mason was in contravention of said Article XII, Sec. 8 and necessarily void as to him. But the court rejected this conclusion, saying: "In this case there is no showing that the appellant corporation ever acquired any of its property except by purchase and under those circumstances it was under no obligations to the public to retain its property or to continue its business, longer than it deemed it expedient to do so. In other words no one but its creditors had a right to question the disposition it made of its property * * * * The learned counsel for the respondent and the intervenors insist that, by virtue of the above cited provision of the constitution, the property in ques-

tion is still subject to the claim of the respondent. But we are not of that opinion. That provision declares, in effect, that, if a corporation shall lease or alienate its franchise, neither the franchise nor property held thereunder, shall thereby be relieved from liabilities contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges. This is but a declaration of what the courts have generally held to be the law, irrespective of constitutional limitations or provisions. Chicago, M. & St. P. Ry. Co. vs. Third Nat. Bank of Chicago, 134 U. S. 276, 10 Sup. Ct. 550. But we do not think that there is anything in the law, or this provision of the constitution, which inhibits a corporation from voluntarily transferring property for the payment of debts for which the property so transferred is legally bound."

The State of Utah has the same constitutional provision as that of Washington above quoted, being Article XII, Sec. 7. This provision was invoked by counsel and construed by the Supreme Court of Utah in the case of Wyeth Hardware & Manufacturing Co. vs. James Spencer-Bateman Co., 47 Pac. 604. The facts of this case were that the defendant company being insolvent made a preferential assignment of all its property for the payment of certain of its debts then existing. The plaintiff whose claim was not among the preferred claims brought suit to set aside the deed of assignment and to have the assets of the defendant company declared a trust fund for the payment of the creditors, and the constitutional provision against alienations of corporate property was relied upon by the plaintiff in its suit. The Supreme Court of Utah

at considerable length, and reviewing the authorities, discusses and upholds the right of an insolvent corporation to make an assignment of all its property and prefer certain of its creditors just as an individual may do; and in disposing of the constitutional question say:

"The provisions of the constitution which it is claimed affect the question under consideration are contained in Art. XII, Sec. 7 of which reads: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor or grantee contracted or incurred in the operation, use or enjoyment of such fanchise or any of its privileges." This section simply prohibits a corporation from leasing or alienating its franchise, so as to relieve the franchise or property from the liabilities of the lessor or grantor or grantee; but it does not prohibit any corporation from conveying its corporate property to a trustee for the purpose of subjecting it to such liabilities, and the defendant company by conveying its corporate property expressly for the purpose of subjecting it to liabilities of the grantor, committed no act in contravention of this provision of the constitution."

The conclusion reached by the Utah court in this case is the same as that announced by the Supreme Court of Montana in Ames & Frost Co. vs. Heslett, 19 Mont., 188, decided in 1897, and while said section of the constitution was in full force, wherein this language was used:

"The great weight of authority is against apellants, and, in our opinion, is based on the better line of reasoning. In many of the cases cited, particularly those in the

Federal Courts, the statement is made that the assets of a corporation are a trust fund for the creditors; but it does not follow that even these courts intended by this expression to hold that creditors, by virtue of their mere attitude as such, have any lien upon the actual tangible property of a corporation—that property which belongs to it for its business operations and which is primarily liable for its debts, as distinguished from any secondary liability of directors or stockholders. In our opinion there is no such lien. The trust fund doctrine as invoked by appellants to sustain it, impresses us as an unsubstantial theory, constructed of judicial expressions selected without regard to their context or the facts in reference to which they were uttered. We refer, of course, to the cases where the adoption of the doctrine only appears inferentially. * * * * There is nothing in the statutes of Montana in force when this controversy arose forbidding such assignments, and, according to a large majority of the authorities, insolvent corporations and insolvent individuals are upon the same plane at common law in respect to them."

See also the decision of this court in Coler vs. Allen, 114 Fed. 609.

Concerning those provisions of the Washington and Utah constitutions it will be observed that they are practically the same as that of Montana, being, however, of broader effect in that they are direct limitations upon the corporation itself; and as to the facts, in that the claims referred to in the above cited cases were in existence at the time of the transfers and not as in the case at bar one

which had its inception more than six years after the mortgage. To construe the section in question as appellee contends would not only nullify the registration laws of the state but in the present instance would deprive the appellant, Central Trust Company of a substantial portion of its property and leave it entirely remediless, for the bill of complaint avers (Record p. 9): "Your orator is informed and believes that the defendant Helena company is insolvent and wholly unable to pay its debts and obligations and that the property and premises covered by said mortgage are of a value less in amount than the amount of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds," and the decree finds (Record p. 63): "That the defendant Helena company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by said mortgage are of a value less in amount than the amount of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of said bonds," and this too, as the result of a case (the suit of Warren vs. the Helena Power and Light Company) to which it was not a party and in which it had no opportunity to be heard. This, we submit, would be plainly violative of section one of Amendment XIV to the Federal Constitution.

The prohibition in the Fourteenth Amendment to the Constitution of the United States against any state depriving any person of life, liberty or property without due

process of law applies to corporations as well as natural persons. In other words, a corporation is a person within the meaning of this provision of the Constitution of the United States.

Covington & L. Turnpike Co. vs. Sandford, 164 U. S. 591.

The right which a mortgagee under a mortgage, or the trustee under a trust deed in the nature of a mortgage, has by virtue of such mortgage or trust deed, to have the property described therein aplied to the satisfaction of the indebtedness secured thereby, constitutes property. The principle is well established that to constitute due process of law there must be notice and an opportunity for a hearing, or, in other words, a party must have his day in court. Mr. Cooley in his work on Constitutional Limitations, page 432, says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; the law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.'"

Pennoyer vs. Neff, 95 U. S. 715.

Rees vs. Watertown, 86 U. S. 107.

Co. of San Mateo vs. S. P. R. Co., 13 Fed. 762.

Stuart vs. Palmer, 74 N. Y. 190.

Hutson vs. Protection District, 79 Cal., 90.

Chauvin vs. Valiton, 8 Mont., 451.

Tay vs. Hawley, 39 Cal., 95.

Lowry vs. Rainwater, 35 Am. Rep. 420.

Scott vs. McNeal, 154 U. S. 43.

The learned judge of the Circuit Court was clearly right, we submit, in saying that he did not consider that the section of the Montana Constitution in question had any application to this case.

In conclusion, we respectfully submit that there is nothing in the laws of Montana applicable to such a case as the one here presented which gives priority to a claim originating in 1901 over a valid grant made in 1895; that the Circuit Court erred in holding otherwise and in rendering the decree complained of and that the same should be reversed.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. & S. H. McINTIRE,
Solicitors for Appellant, Central Trust Company.
H. S. HEPNER,
Solicitor for Appellant Helena Power and Light Company

NO. 863.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CENTRAL TRUST COMPANY, OF NEW YORK, (A CORPORATION) AND THE HELENA POWER AND LIGHT COMPANY (A CORPORATION),

Appellants.

VS.

JOHN W. WARREN,

Appellee.

BRIEF OF APPELLEE.

T. J. WALSH,
Counsel for Appellee.

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Appellee.

BRIEF OF APPELLEE.

I. MOTION TO DISMISS.

1. The appellee has moved to dismiss the appeal herein upon the ground that it is taken from a part of the decree only, and this court has no jurisdiction to review by appeal a part of a judgment or decree, and because the decree from which the appeal is taken in part has already been enforced and executed.

The act of Congress conferring its jurisdiction upon this court authorizes it to review by appeal any final decisions of

the circuit courts. In order to invoke the jurisdiction of this court, the entire decree must be brought before it by the appeal. There is no such thing as an appeal from a part of a final decree or judgment unless power to do so is expressly conferred by statute. It has been so determined by the Supreme Court of the United States, as well as by the Supreme Court of the Territory of Montana.

In Canter vs. Am. Ins. Co., 3 Peters, 316,

Mr. Justice Story says:

"It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legisiature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeal. It would occasion very great delays and oppressive expenses."

The proposition was directly determined in the case of

Barkley vs. Logan, 2 Mont., 296,

the ruling being expressed in the syllabus as follows:

"An appeal from only a portion of the decree or final judgment is not authorized by statute and cannot be entertained."

In the body of the opinion the Court says:

"When an appeal is taken from a judgment, it must be taken from the whole of it. The statute does not authorize the taking of a judgment into an appellate court for review by piecemeal. The appeal must bring the whole judgment before the appellate court. This court cannot reverse or affirm the fragment of a judgment. Jurisdiction for this purpose has not been conferred. * * * We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment, unless the whole judgment is before it. The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

In support of the conclusion so pointedly expressed, the

learned Chief Justice refers to the remarks of Mr. Justice Story in Canter vs. American Insurance Company, above quoted. The decision in this case was affirmed in the case of

Plaisted vs. Nowlan, 2 Mont., 359,

and has never been departed from. The proposition was also directly adjudicated in the case of

Wright vs. Western Union Tel. Co., 4 Oh. C. C. 375.

The statute of the state of California, by evident implication, permits an appeal to be taken from a part of a judgment. The jurisdiction could not be supported by a grant of authority simply to review final judgments.

Hayne on New Trial and Appeal, Sec. 185.

The law does not favor the decision of controversies piecemeal.

Elliott on Appellate Proc., 91.

The Helena Power and Light Company appeals from this part of the judgment, as well as does the Central Trust Company. If the Helena Power and Light Company has the right to appeal from this part of the decree, it also has the right to appeal from that part of the decree awarding a deficiency judgment against it, in case the mortgaged property shall be insufficient to pay the indebtenness. It might also appeal from that part of the judgment directing a sale of its property, and on such appeal urge that it had no statutory or other authority to execute the mortgage, or that it was invalid for any other reason. In other words, if it be conceded that an appeal can be taken from a part of a judgment, the number of different appeals which might be taken in this case by the Helena Power and Light Company would be limited only by

the number of separate propositions involved in the decree.

It appears that the Central Trust Company obtained substantially all the relief asked for by them, but the court might have reached the conclusion that it was not entitled to a deficiency judgment, and, had a decree been entered to that effect, the Central Trust Company would have as good a right to prosecute a separate appeal from that part of the judgment as it has from that part from which it has appealed. By an appeal in a suit in equity, the whole case is removed into the court above for trial *de novo*.

"There is no decree left in the lower court, and, pending the hearing on appeal, there is no decree in the case."

Sharon vs. Hill, 26 Fed. 337-345;

Yeaton vs. United States, 5 Cranch, 281.

In view of the nature of an appeal in equity as expressed in the case of Sharon vs. Hill, *supra*, it is evident that there can be no such thing as an appeal from a part of the decree.

2. The decree from a part of which this appeal is prosecuted has already been enforced, as shown by the certified copies of the notice of sale, report of master and order confirming sale, filed with this motion. It is settled beyond question that a party cannot at one and the same time enforce a judgment obtained by him and at the same time prosecute an appeal for its reversal.

Albright vs. Oyster, 60 Fed. 644.

In this case the Circuit Court of Appeals for the Eighth Circuit said:

"No rule is better settled than that a litigant who accepts the benefits, or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escap-

ing from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court."

Knapp vs. Brown, 45 N. Y. 207;

Laird vs. Giffin, 54 N. W. 584 (Wis.);

Portland Const. Co. vs. O'Neill, 32 Pac. 764 (Or.).

3. If the appeal could be sustained, notwithstanding the objections above urged, the appellants have no right to unite in an appeal. Each may have a separate right of appeal, that is, each might be entitled to obtain a separate order of appeal and give a separate bond on appeal, but they have no right to unite in an appeal, as they have no joint interests.

II. ON THE MERITS.

The mortgagee, the Central Trust Company, and the mortgagor, the Helena Power and Light Company, have prosecuted a joint appeal, given a single bond, united in the assignment of errors, and filed a joint brief. The assignment of errors is an essential part of the record on appeal, as well as upon the writ of error. It is a rule, perhaps universally declared in those jurisdictions requiring the assignment of errors, that if an assignment is made by parties jointly, it must be overruled unless the assignment can be sustained as to all the parties joining in the assignment,

Tretheway vs. Peek, 62 N. E. 59;

Curtis vs. D. M. Osborne & Co., 89 N. W. 420;

Woodruff vs. Smith, 31 So. 491.

See generally 3 Century Digest, 819.

It follows from this that if any one of the parties who joins in the assignment of error is in such a position that the assignment cannot be sustained as to him, it must be overruled as to all.

Curtis vs. Osborne, *supra;*

Moseman vs. State, 81 N. W. 853.

The error complained of in this decree is one that in no manner concerns the Helena Power and Light Company. From the allegations of the bill it appears that it is utterly insolvent and that the mortgaged property is insufficient to satisfy the claim of the complainant. Whether out of the avails of the mortgaged property the complainant shall be first paid, or the appellee, is a matter of absolute and utter indifference to it. Had it taken a separate appeal from the decree in this case and urged nothing further than that the decree was erroneous in awarding the appellee a priority over the complainant, the court would properly have affirmed the decree without inquiring into the merits of the contention, upon the ground that its interests were in no manner affected by that provision of the decree. If any complaint of that character was to be made, it should manifestly come from the complainant, and not from the Helena Power and Light Company. So manifestly immaterial to the Helena Power and Light Company is this portion of the decree that the Central Trust Company, prior to the taking of this appeal, prosecuted another appeal from this decree, altogether omitting the Helena Power and Light Company from the record. This appeal appears still to be pending in this court, but is apparently abandoned by the appellant therein, the Central Trust Company.

But there is another rule that forbids the consideration by the court of the error assigned. Parties are not entitled to join in an assignment of error unless they join in the excep-

tion upon which the assignment is founded.

Davis vs. Seybold, 61 N. E. 743;

Smith vs. Am. C. M. Co., 62 N. E. 1013.

The Helena Power and Light Company has manifestly no right to come to this court complaining of a decree in which it fully acquiesced in the court below. It took no exception whatever to the order below denying the application of the complainant for a decree as prayed in its bill of complaint. It was not even present, and was not heard on the presentation of this question in the court below. If it had any interest in the question it certainly did not assert it there, and it appears with little grace before this court complaining of an alleged error on which it was altogether silent in the lower court. The defendant did not answer at all below, and the decree was taken against it *pro confesso.*

Transcript, page 53.

The motion of the Central Trust Company, the denial of which by the Circuit Court is made the basis of complaint here, was not served upon the defendant, Helena Power and Light Company, or any one representing it, and it does not appear from the record that it was present at the hearing. There was, therefore, no joint application to the court below by the defendant, Helena Power and Light Company, and the complainant, Central Trust Company, for judgment in favor of the Central Trust Company, as prayed in its bill of complaint, and there could not well be. They have, therefore, no joint right to except or complain of the rule of the court upon the motion, and their joint assignment of error being bad, accordingly, as to the Helena Power and Light

Company, is bad as to both of the appellants.

It is to be regretted that the brief of appellants should have ventured to say to the court what were the views of the lower court touching the question involved, when no written opinion was filed. Such a course is almost certain to invite contradiction, and, in this instance, demands it. The writer was not present at the time the ruling complained of was made, but on a later day the counsel for the appellant, Central Trust Company, who was apparently not in court either, addressed a remark of inquiry to the court and was told by the judge that he ~~had held that he~~ had not considered the question of the applicability of the constitutional provision relied upon by appellee, because in his judgment there was no statute of the State of Montana under which a street railway company could be organized, except that providing for the incorporation of railroad companies, under which act, if the mortgagor or defendant were incorporated under it, appellee's judgment would be entitled to priority over complainant's mortgage. In other words, the court said he had not determined whether Section 17 of Article XV of the Constitution of Montana did or did not give the appellee's judgment priority.

The appellee concedes that if there were no other statute under which the incorporation of street railway corporations in Montana could be justified, authority might be found in Section 446 of the Compiled Statutes, under which ~~appellee~~ appellants claim it must be considered to have come into existence, which section is as follows:

"Sec. 446. At any time hereafter any three or more per-

sons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business; of digging ditches, of building flumes or running tunnels, of purchasing, holding, developing, improving, using, leasing, selling, conveying or otherwise disposing of water powers and the sites thereof, and lands necessary or useful therefor, or for the industries and habitations arising or growing up, or to arise or grow up, in connection with or about the same; of purchasing, holding, laying out, platting, developing, leasing, selling, dealing in, conveying, or otherwise using or disposing of townsites, or towns, or the lots, blocks, or subdivisions thereof, or lots, blocks, or subdivisions in any town, village or city, or of carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business." * *

The word "industrial," used in this statute, is doubtless broad enough in its significance to include a street railway company if it includes an express company, as was decided in

Wells Fargo & Co. vs. Railway Co., 23 Fed. 469,

a mercantile business as was held in

Carver Merc. Co. vs. Hulme, 7 Mont. 566.

and in

Bushford vs. Agna Fria Co., 35 Pac., 983

But by the same course of reasoning the incorporation of an ordinary railroad company could be justified under this section. If the language is broad enough to include a street railway company, it is broad enough to include the ordinary steam railroad company. It cannot be contended that the business of the former is "designed to aid in the industrial interests of the country" and that that of the latter is not. Indeed, if the matter permitted of doubt, it could be confidently asserted that whatever doubt existed would be resolved in favor of the steam railroad company.

Yet no one will contend, inasmuch as there is a special statute providing for the incorporation of railroad companies, that such companies are embraced within those referred to in Section 446, or that a railroad company could be organized in the manner prescribed in that section and others of the same chapter.

Railroad corporations are organized under the provisions of Chapter XXXV of the 5th Division General Laws of Montana (or before July 1, 1895, when the codes were adopted). One of the sections of this chapter, Section 707, provides that—

"Sec. 707. A judgment against any railway corporation for any injury to person or property, or for material furnished or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

It is not a question as to whether the incorporation of street railway companies may be justified under a statute providing for the incorporation of industrial companies, but when there are two statutes, one for the incorporation of industrial companies and the other railroad companies, a street railway company is to be deemed incorporated under the former or under the latter.

No such question was presented in the case of Massachusetts Loan and Trust Co. vs. Hamilton, as in that case the mortgagor company was a corporation created under the laws of the State of New Jersey.

Undeniably if the defendant company is to be deemed incorporated under the provisions of Chapter XXXV, its

mortgage would be subject to the provisions of Section 707.

Although, as stated, the word "industrial" as applied to corporations might, under certain circumstances, be deemed to include street railways, it must be conceded that the term is not apt and that a most liberal construction must be indulged in order to embrace such corporations. The term "industrials" is in very common use to designate certain classes of stocks traded in on exchanges, but no one ever thought of applying the term to the shares in a street railway or in an ordinary steam railroad company. If one were asked as to what the industries of a city or state are, it would be a queer answer to say, "railroads and street ra lways," or to include them in any list of industries.

We submit, therefore, that when the record is altogether silent as to whether the defendant company was incorporated under the provisions of Chapter XXXV concerning "Railroad Corporations," or Chapter XXV relating to "Corporations for Industry or Productive Purposes," it cannot be deemed to owe its origin to the latter rather than to the former.

Whatever distinction once existed between street railways, so-called, and other railways, is fast passing away. With the application of electricity to the purpose of locomotion, systems formerly known as street railways traverse many miles of open country. This defendant company for several years, by way of illustration, operated its line between Helena and East Helena, six miles distant. There is no doubt that under the federal statute it would have been entitled to a right of way over any intervening portion of the public domain. Freight of all kinds is now being transported in the same way. When

electricity supplants steam as the motive power of the so-called "railroads of commerce," every vestige of distinction will have gone. It can not be considered that the defendant company must necessarily have been incorporated under the provisions of Chapter XXV.

3. But we most respectfully insist that the decree is right by reason of Section 17 of Article XV of the Constitution of Montana, as follows:

"Sec. 17. The legislative assembly shall not pass any law permitting the casing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

It appears to be contended by the appellants that the defendant company did not alien any "franchise," nor use, operate or enjoy any "franchise," its rights being something of a different character, denominated in the brief a "license." (Page 21.)

The bill of complaint alleges the execution of a mortgage upon "franchises" held by the defendant company,

Transcript, page 5,

and asks that a receiver be appointed to take possession of the "franchises" of the defendant, together with the other property.

Transcript, page 11.

The mortgage made by it purports to mortgage its "franchises,"

Transcript, page 17,

and particularly designates that "certain railway and *franchise* situated in said city of Helena, etc.,"

Transcript, page 22,

and, lest the description should not be sufficiently definite, it is said, at page 25, that "it is the intention hereby to convey all property of every kind and character owned by the grantor, * * whether situated within or without the corporate limits of said city of Helena, together with all and singular the *franchises*, grants, rights, easements and privileges now owned and enjoyed by the said grantor." The decree finds that the franchises were mortgaged.

Transcript, page 60.

So far as the defendant company could do so it undoubtedly mortgaged its franchises by this mortgage, and the complainant so represents the facts to the court.

Numerous definitions of the word "franchise" are collected by Professor Thompson,

4 Thompson's Commentaries, 5335,

including that of Chancellor Kent, to the effect that "franchises are privileges conferred by grants from the government and vested in private individuals." And, from another source, "the right or privilege of being a corporation and of doing such things and such things only as are authorized by the corporation's charter." In the same connection he speaks of the "franchise of laying a railroad in the streets of a city," and, continuing with reference to franchises of this charrcter, he says, "while these municipal grants are often termed licenses on the theory that a municipal corporation cannot grant a franchise, and can only grant a license, yet they are franchises in every essential particular, as much as though

they had been granted directly by the legislature." The Supreme Court of the Udited States defined the term in

Bank of Angusta vs. Earle, 13 Peters, 519,

as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally by common right."

The right to lay down a railway and operate it in the streets of a city is a privilege not enjoyed by citizens generally by common right. An ordinary citizen, not having municipal authority for it, would find himself guilty of a nuisance if he attempted to operate a street railway. Citing this definition, it was held in

Detroit vs. Detroit Railway, 56 Fed. 882,

that the privilege of constructing and operating a street railway is a "franchise." So it was held by the Supreme Court of Wisconsin in

State vs. Madison Street Railway Co., 40 N. W. 487-490,

the court saying, "the immunities and privileges granted the company by the ordinances are as much the franchises of the corporation as it they had been directly granted by the statute under which it was organized."

The right granted by the city to collect rates for water furnished was held to be a franchise in

Spring Valley Water Co. vs. Schottler, 62 Cal. 107-108,

in the opinion in which will be found an extensive discussion of the subject of franchises.

Similar privileges were held to be franchises in

City of Ashland vs Wheeler, 88 Wis. 616.

The right to construct and maintain a bridge is also a franchise.

West River Bridge Co. vs. Dix, 6 How. 541.

Nothing to the contrary was declared in either of the cases cited in the brief of appellants in support of their contention that the defendant mortgaged no franchise. In the Texas case cited,

San Antonio Street Railway Co. vs. State of Texas, 63 Tex. 529,

the right and privilege enjoyed by the company to operate its lines of railway in the streets of the city is repeatedly spoken of as a franchise, thus:

"The franchise in question was granted by the city council and the claim is that it is by virtue of that concession and its acceptance by the company that the duty arose. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the *franchise* which *imposed* that obligation."

In the case of

State ex rel. Knight vs. Helena Power & Light Co., 22 Mont. 391,

it was held merely that the company was not obliged to operate a line of road which it had constructed. No attempt is made in the opinion to deny that the right and privilege granted was a franchise.

What, then, is the meaning of Section 17? The appellants do not attempt to enlighten the court upon the question. They do not undertake to tell the court to what connition of affairs it was intended the section should have applica.ion,—what abuse it was intended to remedy or prevent. They offer no explanation whatever as to what it means or why it

is in the constitution, except such as is implied in the quotation from the opinion in Klosterman vs. Mason to the effect that it is a mere declaration of what the law always had been. The context denies us the power to assume that the constitutional convention was simply making a declaration of what the law was and always had been. It is one of twenty sections comprising Article XV, all practically denying to corporations powers, and restricting the legislature from resting in corporations powers which they might otherwise enjoy by express or implied authority from the legislature. It is provided among other things, for instance, that the right is always reserved to alter or repeal all laws relating to corporations and to alter, revoke or annul any charter—obviously to render inapplicable the law of the Dartmouth College case; that no corporation shall issue stocks or bonds except for labor done, service performed, or money and property actually received—evidently to prevent or minimize the evils of watered stock. This provision means something, and it unquestionably was inserted to meet some existing or anticipated evil or abuse. What that was is not hard to divine. Under the law, as it existed at the time the constitution was adopted, a corporation owing any duties to the public—that is, enjoying franchises—could not, without legislative authority, relieve itself from liabilities incurred in the use or enjoyment of its franchises by conveying away or leasing the property held under them to one who should operate under them.

A distinguished writer thus expresses the rule :

"Sec. 5355. Franchises of Corporations Having Public Duties to Perform Not Alienable.—A numerous class of cases

hold that the franchises of corporations *having public duties to perform*, such as railway companies, canal companies, turnpike companies, gaslight companies and the like, cannot be alienated or seized under judicial process by creditors without the consent of the legislature, because this would disable them from discharging the public duties which they have assumed, and in consideration of which their franchises have been granted to them. The principle is susceptible of the broadest possible statement. It is, that a corporation cannot disable itself, by any species of contract with another corporation or person, without the consent of the legislature, from performing the public duties which it has undertaken, and cannot, by such an agreement, put itself in a position where it will be compelled to make the public accommodation subservient to its private interests. If, therefore, a *railroad company* aliens its railroad, its properties and franchises by *lease*, *mortgage* or in any other way, to another corporation, and substitutes that other corporation in its own place, and devolves upon it the performance of its own public duties, without statutory authority so to do, it will remain liable for the *torts* of the company, committed against third persons while so operating its road."

"Sec. 5536. Under the operation of the foregoing principle, the prevailing doctrine is, that the *secondary franchises* of a railway company—that is to say, the franchise of *constructing* and the franchise of *operating* its railway, are not alienable in any form, whether by sale, lease or mortgage, without the express consent of the legislature."

4 Thompson's Commentaries, 5355, 5356.

It will be observed that such a corporation could not, either by mortgage, lease or any other conveyance, transfer its property so as to relieve it or the property it held under its franchises from torts committed in the use of the franchise—"*without the consent of the legislature.*"

Accordingly, corporations of this character procured acts of the legislature to be passed authorizing them to lease,

mortgage or otherwise alien their property. Under acts of this character it was held that the original corporation was not liable for acts committed by its successor, and, of course, the property in the hands of the successor was exempt from any claims against the original owner, not constituting a lien.

Lakin vs. Willamette Valley R. Co., 11 Pac. 68.

Now, having in mind the former state of the law and abuses which had grown up, hereafter referred to, it is not difficult to get at the meaning of this section. Clearly it means that the legislature may authorize corporations holding franchises, as it might before the constitution, to convey property held by them subject to public uses, but that any law permitting them to do so, must be subject to the provision that the property in the hands of the alienee should remain subject to any debts incurred by its predecessor in the operation, use and enjoyment of the property (that is, the property should not be relieved of the liability), and the original owner should remain liable for torts committed by the party into whose charge or possession it placed the property.

It is respectfully submitted that the plain meaning of this section of the constitution is, that if a corporation operating under a public franchise should sell out and transfer its property to another corporation or individual, the property in the hands of the purchaser would still be liable for all obligations incurred by the original owner in the operation, use or enjoyment of the franchise. That the liability of the Helena Power and Light Company to the defendant Warren was incurred in the operation, use and enjoyment of its franchise to run street railways, does not admit of doubt.

If the property of the defendant company had not been

mortgaged, and they should, after the liability was incurred and before judgment was obtained, sell out and transfer all of their property to another corporation, there is no doubt that the property would be liable in the hands of the purchaser to any judgment which Warren might subsequently obtain against the defendant company. That this is the construction of this provision of the constitution so far as it goes there can be no doubt whatever.

The only question that can possibly arise upon the section of the constitution is as to whether a mortgage is included within the term "alienation" as used in it.

In determining this question, as well as the significance of the entire section, we are to consider the abuse which the makers of the constitution were seeking to prevent or to remedy. We are to consider the public policy of the state as evidenced by existing statutes and by the statutes of other states.

In the constitutions of the older states, it is rare that any specific provisions will be found limiting the powers of corporations or of the legislature with reference to corporations, or guarding against abuses which have grown up with respect to corporations. On the contrary, it is a matter of public history that these subjects have engaged a very large share of public attention, and in the newer constitutions will be found extensive provisions concerning these matters.

1 Thompson's Commentaries on Corporations, 538.

Every one of these provisions is the result of public thought and public discussion concerning the particular matter to which they relate.

At the time the constitution of Montana was adopted, a statute was in existence as follows :

"A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

Sec. 707, Comp. Statutes of Montana.

Similar statutes are found in the laws of :

Iowa, Revised Statutes (1888), Sec. 2008 ;

Ohio, 2 Revised Statutes, 1064 (Act of 1861.);

Arkansas, statute approved March 19, 1887;

See also Dow vs. Memphis Ry. Co., 20 Fed., 260;

Central Trust Co. v. R. R. Co., 41 Fed., 551.

The policy of the state, as clearly evinced in this statute, was to make, in the case of railroad companies operating under a public franchise, judgments for work and labor, material furnished and for injuries to personal property by such railway corporations, superior to the lien of any mortgage upon the railroad property, even though such mortgage might have been executed prior to the time that the liabilities were incurred.

These statutes, as are well known, were passed because it was not an infrequent thing at all that claims of this character were entirely shut out by the foreclosure of a mortgage upon the property of the company, sometimes, indeed, as has been said to have been the case in the case of Mass. Loan & Trust Co. vs. Hamilton, for the express purpose of ridding the property of the burden of the judgment. Nearly all of

these corporations operating under public franchises execute mortgages upon their plant to secure bonds. The franchise is enjoyed and the property operated year after year and the company pays its obligations as they accrue. Suddenly an action is begun to foreclose the mortgage, and immediately a receiver is appointed, with the result that those who have given their labor to produce interest which was paid regularly to the mortgagees until default, are defeated of their claims. The injustice of this has become so manifest to courts of equity that it is almost an established rule to refuse in these cases the appointment of a receiver unless the complainant seeking it will agree that out of the funds coming into the hands of the receiver there shall first be paid liabilities incurred in the operation of the property for six months last past, or some other period to be fixed by the court, according to the nature of the particular case.

See the extensive discussion of this subject in

Beach on Receivers, Sec. 387 *et seq.*

In Section 387, above cited, we find the following language:

"Sec. 387. Of the Power of the Court to Give Priority to Claims. That, in a proceeding to foreclose a mortgage and to compel the sale of the mortgaged property for the purpose of paying the debt secured upon it, courts should declare debts of any kind subsequently contracted to be a prior lien, seems, at first sight, to be unreasonable and unjust, and that they should authorize and direct their officer in possession of such property to borrow money and make the loan a lien above all other incumbrances, seems still more unreasonable. Bnt the peculiar nature of railroad property, in that its chief value consists in its continuous operation, and the fact that the general public has a direct and important interest in

the uninterrupted use of the road, together with the long established practice that it is the duty of the court to preserve the property and not to allow it to deteriorate so as to cause a loss to those interested in it, have compelled courts not only—as we have seen—to manage and operate railroad lines, but, in order to do so, to provide the means for securing supplies, labor and other necessities. Though this right has often been questioned, and was formerly strenuously opposed, it may now be considered as definitely settled," citing Wallace vs. Loomis, 97 U. S., 146.

It is not only the expenses paid by the receiver that are paid in preference to the mortgage, but many other expenses which were incurred by the company itself prior to the time that application was made for the appointment of a receiver.

We quote from Section 390 of the foregoing work as follows:

"Sec. 390. Of Preferential Debts for Wages, Labor, Material and Supplies.—The practice of the courts in regard to allowing priority in payment of wages earned and materials furnished before the appointment of a receiver seems to have been founded upon the principle that the interests of bondholders and other creditors require that the line of a railroad shall be kept in uninterrupted operation, and because such debts would have to be paid by the company if no receiver were appointed.

"In a late case in the Supreme Court of the United States, it was held that items for wages due employees of a receiver, within six months immediately preceding his appointment; debts due to other railroad companies and for supplies and damages; debts incurred for the ordinary expenses of the receiver in operating the road, may be allowed priority out of the earnings, and if there is no income fund, after scrutiny and opportunity for those opposing to be heard, then out of the trust property itself. The limit of six months has been fixed in several cases, but there seems to be no good reason why any time should be arbitrarily named."

There is no doubt that it was in view of these conditions and circumstances, and in accordance with the public policy manifested by the statutes referred to, that the provision appealed to was incorporated in the constitution.

The only question that can possibly arise is as to whether the language used will permit the contention that a mortgage is an alienation. It is true that in the strict technical legal sense of the word "alienation," mortgage is not meant, but in the construction of statutes, and particularly of constitutions, the purpose is to be gathered from the general scope of the statute and the evil to be remedied, and the language used is to be construed with reference to such conditions and purposes.

The word "alienation" has frequently been held, in the interpretation of statutes, to include a mortgage. Constitutional provisions are not infrequent to the effect that a homestead shall not be alienated except by the joint act of the husband and wife. These provisions have been uniformly construed to forbid the execution of a mortgage by either alone.

In the case of

Brewster vs. Madden, 15 Kan., 250,

in an opinion by Judge Brewer, it is taken for granted that a mortgage would be an alienation, within the meaning of this constitutional provision, and it was so expressly determined in

Ayers vs. Probasco, 14 Kan., 190.

A similar construction was given to a statute so providing concerning homesteads in

Dunker vs. Chedick, 4 Nev., 378,

and the same significance is given to the language with reference to statutes and constitutions of the same character in

Jelinek vs. Stepan, 41 Minn., 412, and in

Kennedy vs. Stacy, 1 Baxter, 424, and

Sampson vs. Williamson, 55 Am. Dec., 762.

In Vrumage vs. Shaffer, 35 Ind., 341,

the statute provided that if a wife should inherit property from her husband, and should then marry again, she should not be permitted to *alien* such property. It was held that under this statute she was not permitted to mortgage the property, the court saying that a mortgage is in some sense an alienation, and is clearly so within the meaning of the statute under consideration.

The term was also held to include a mortgage within the purview of the statute considered by the court in the case of

Stansburg vs. Company, 4 N. J. Laws, 440,

and in

Behn vs. Phillips, 18 Ga , 466.

See also Wapples on Homestead and Exemptions, 375-376;

Thompson on Homesteads and Exemptions, 466.

Even in cases of insurance, although the mortgage is not held to be an alienation so as to produce a forfeiture ordinarily of the mortgage under a clause forbidding alienation of the property, yet when the mortgage is foreclosed and a sale made by the Master in Chancery, the alienation is held to be complete and the policy becomes void.

May on Insurance, Secs. 264-269.

From these sections we quote as follows:

In the former section, speaking of what constitutes an

alienation, the author says, "and so, perhaps, is a sale by a master in chancery of a mortgagor's interest under a decree by foreclosure, with part payment of the purchase money and execution by the vendee of the articles of sale."

From Section 269 we quote as follows:

"When, however, the title becomes absolute in the mortgagee or his assigns, by foreclosure, or, as is tantamount to a foreclosure, merger in the purchaser of the equity, who subsequently takes an assignment of the mortgage, the transfer is complete and the *change of title is an alienation.*"

Professor Thompson also speaks in the sections above quoted of *aliening* by mortgage.

If the constitution had read, "The legislative assembly shall not pass any law permitting the leasing or alienation, *by mortgage or in any other way*, of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges," it could not be fairly disputed that the property would remain subject to the appellant's judgment. A careful consideration of the section impels the belief that it means the same as though it had been so expressed.

It is to be borne in mind also that the cases in which corporations of this character had made absolute and instant sales of their property, and thus defeated the just claims of creditors, were very few, while the instances in which liabilities incurred in the operation of the property under the franchise, by a foreclosure sale, had so operated, were so frequent that courts of equity developed a means of at least mitigating it.

Illinois Trust vs. Doud, 105 Fed., 123-150.

Legislatures had passed acts to still further correct it. It is not to be considered that the legislature intended to make the property liable in the hands of one holding by a direct and absolute transfer, and leave it free when it came to him by process of foreclosure. There was little occasion to provide for the former contingency,—there was abundant to suggest provision as to the latter.

The appellants, without expressly admitting it, apparently concede that if an absolute transfer were made, the property would still remain liable for the debts of the transferror. They say that "it relates at most to liabilities which had their existstence which were contracted or incurred at and prior to the time of the transfer." It must be remembered that under the authorities heretofore cited, unless the legislature either expressly or impliedly provided otherwise, the original owner and the property remained liable for torts committed after the transfer, for liabilities thereafter incurred as well as those theretofore incurred. This section was plainly intended to deny to the legislature the right to pass a law which would release this obligation. But it is perfectly evident that the section refers to future obligations as well as past ones. The legislature is denied the right to relieve either the corporation or the property from obligations incurred in the use of the franchise. As to past obligations—those occurring before the transfer, it was already beyond the power of the legislature to relieve the corporation. If it contracted any debt or injured anyone in person or property, it was already beyond the power of the legislature either by general anticipatory legislation or by spe-

cial relief act to release it from the obligation to pay. Such a law would deprive a man of property without due process of law.

It is beyond the power of the legislature to release a party obligated and throw the burden on someone else. So the framers of the constitution must have intended future obligations to be incurred by the transferree as well as past charges. It is said that to give the section this construction it is necessary to interpolate the words, "or which may thereafter be incurred." As well may we charge that in order to give it the construction contended for by appellants the court must insert the words, "which may have theretofore been." There is an elipsis, anyway, and the plain meaning is brought out by considering that it reads as though the words "thereafter or theretofore" were inserted before "contracted."

This argument is based, further, upon the assumption that by the mortgage the property was transferred to the mortgagees in 1895. A mortgage is not a transfer under the laws of Montana, but a lien.

Under the authorities cited above the alienation by the mortgage becomes complete when the sale is made by the master. The decree, if modified as appellants desire it should be, would provide that the property should be conveyed by the master's sale so as to relieve it in case the avails of the sale are not sufficient to satisfy the complainant's claim, from the burden of appellee's judgment rendered against the Helena Power and Light Company on account of a liability incurred by it in the use and enjoyment of its franchises.

It was remarked above that the appellants do not venture

any opinion as to what this section does mean or what its application is, but they cite some cases to show that it does not mean what appellee claims it does. Reference is made to the case of Antietam Paper Co. vs. Chronicle, 115 N. C., 143, arising on a statute giving a priority over railroad mortgages, claims for labor and material, and for injuries to person and property. It was held that paper, ink, gas, etc., were not "materials" within the language of the statute. The applicability of this case is not very obvious. Another case is cited from the same state holding that some other goods furnished were not "materials" under the statute, and still another holding that cotton and flour were not, either.

Reference is then made to the case of Klosterman vs. Mason, in which it is said that the section is "but a declaration of what the courts have generally held to be the law." As shown above it never has been the law and no court ever held it was the law that the legislature could not pass a law permitting a corporation to alien its property so as to relieve it from further liability. It has been expressly and repeatedly held that the legislature has that power in the absence of constitutional restriction. The expression is inaccurate. But when the case is examined it is found that nothing was decided that is of assistance in this inquiry. The company transferring in that case, owned a railroad, but it did not appear that it had any franchise except its right to be a railroad corporation, and that it could not possibly transfer except by virtue of a most unusual statute. It "was not designed or intended as a road for general traffic, but simply as a means of transportation of logs to the company's mill." It was a part

of the property appurtenant to a milling business. It was conveyed with other property in satisfaction of an indebtedness of the company. Klosterman obtained a judgment against the company for $300, but it did not appear that it was on a liability incurred in operating the railroad. He really attacked the conveyance as fraudulent. The facts, which would invoke the proper protection of the constitution, were not in the case at all.

In the case of

Wyeth vs. James Spencer, 47 Pac., 604,

it appeared that a corporation, apparently enjoying no franchises except its existence, made a general assignment for the benefit of creditors. The court said that this conveyance was made for the express purpose of paying its obligations and was clearly forbidden by the constitution.

The case of

Ames & Frost Co. vs. Heslet, 19 Mont., 188,

said to have decided the same way, does not even refer to the constitutional provision under consideration.

The appellants finally contend that the construction of this provision of the constitution claimed for it by appellee, would deprive the complainant of property without due process of law. Inasmuch as the Helena Power and Light Company was incorporated and executed this mortgage long after the constitution was adopted, the contention is without force.

Central Trust Co. vs. Boukright, 65 Fed., 257-259

If by this ~~agreement~~ argument it is meant to assert that the complainant had a right to be heard upon the facts upon which

appellee's judgment was founded, it is sufficient to answer that the facts were set up in the answer, and the complainant did not see fit to take issue on them, but moved for judgment, notwithstanding—in fact, took his decree upon the bill and answer, the latter being taken as confessed.

It is respectfully submitted that the plain purpose of this statute was to meet exactly such a case as is now presented, and that it was intended by it to leave the property in the hands of the purchaser under any foreclosure sale of this mortgage sought to be foreclosed, still subject to the liabilities incurred by the Helena Power and Light Company in the operation, use and enjoyment of the franchises mortgaged.

Respectfully Submitted.

T. J. WALSH,

Counsel for Appellee.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, OF NEW YORK, (a corporation), and the HELENA POWER AND LIGHT COMPANY, (a corporation),

Appellants,

vs.

JOHN W. WARREN,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

T. J. WALSH,
Counsel for Appellee.

R. R. PURCELL and
T. J. WALSH,
Solicitors for Appellee.

In the United States Circuit Court of Appeals

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Appellants,

vs.

JOHN W. WARREN,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

In addition to the authorities cited in the original brief on the proposition that, except by virtue of some statute clearly giving the right, an appeal will not lie from a part of a judgment, and that the ordinary statute permitting appeals from final judgments will not warrant an appeal from a part of a judgment, the attention of the court was called at the argument to the case of

Farmer's Bank vs. Key, 33 Ore. 443.

The citation is here noted for reference by the court. Authorities can be found to the effect that a party has no right to complain of a portion of a decree which does not affect his interests, but by an examination of the cases it will be found that they do not hold that he may appeal from that part of the decree which does affect his interests, but declare simply that he may appeal from the whole decree, and on such appeal will be heard to urge

error only in respect to those particulars by which his rights are affected.

Other authorities will be found which are to the effect that where there are two separate and independent parts to the decree, so that the one is not affected by the other, a party may appeal from the decree and allege error in one particular, though he has by execution or otherwise enforced the other part. In the same manner, these authorities do not permit an appeal from the part of the decree with respect to which it has not been enforced, but they hold simply that the party may take an appeal from the entire decree, with the right to assert error in that part which he has not enforced, but not in that part which he has enforced.

A careful scrutiny has convinced the writer that the authorities are uniform to the effect that unless the statute expressly or by clear implication gives the right to appeal from a part of a judgment or decree, such an appeal will not lie.

As stated in the original brief, the California statute clearly gives the right, and so does the New York statute. If an appeal were permitted from a part of a decree only, it is manifest that only that part of the decree from which the appeal was taken would be properly before the appellate tribunal. Even though the entire decree had been copied into the record, it would not be before the court in any such way as that its provisions, other than those appealed from, could be noted.

At the argument, counsel for the appellants referred to some cases touching the necessity or lack of necessity

of making some of the parties to the action below parties to the appeal. It was said that it had been decided that in the present instance the mortgagor is a necessary party to the appeal. These are questions altogether beside the one under consideration, and the authorities discussing the subject of who are or who are not necessary or proper parties to the appeal have no application to the question as to whether jurisdiction is conferred upon this court upon an appeal from a part of a judgment, or whether an appeal of that character permits any review here.

We take this opportunity to present to the court some further considerations touching the question as to whether the mortgage of the appellant Central Trust Company is superior to the judgment of the appellee.

So far as the question of superiority depends upon whether the appellant mortgagor came into existence under the provisions of Chapter XXV or Chapter XXXV of the General Laws of the State of Montana, Fifth Division of the Compiled Statutes, we called the attention of the court at the argument to the alternative confronting the appellants, namely, that if the appellant mortgagor was created under the provisions of Chapter XXXV, the judgment is superior to the lien of the mortgage by the express provisions of that Chapter—Section 707 thereof; if it was created under the provisions of Chapter XXV, it had no right whatever to execute this mortgage, and the appellant mortgagee can claim no rights under it.

Chapter XXV gives to corporations created under its

provisions the express power to execute a mortgage upon its property, rights and franchises. Chapter XXV gives corporations created under its provisions no such right. An ordinary commercial corporation has the implied right to execute mortgages upon its property, but the ordinary commercial corporation enjoys no franchises except the franchise, if it may be so called, of being a corporation, (which need not be taken into consideration here) involving correlative public duties.

The original brief of the appellee referred to the rule that corporations "*having public duties to perform*, such as railway companies, canal companies, turn-pike companies, gas light companies and the like," have, without the consent of the legislature, no power or authority to mortgage their franchises or any of their property necessary to discharge those public duties, and at the argument the attention of the court was directed to the fact that no power whatever is conferred upon the corporations organized under the provisions of Chapter XXV to execute mortgages upon property of this character, or at all.

It is, accordingly, a matter of entire indifference, in the determination of this appeal, whether the appellant mortgagor was created under the provisions of Chapter XXV or Chapter XXXV. If it was created under the provisions of Chapter XXXV, the appellee's judgment is confessedly superior to the mortgage; if it was created under the provisions of Chapter XXV, the mortgage is altogether void, and, accordingly, the appellant mortgagee has no right to complain of the decree. It has no right

to complain that it did not get as much as it is entitled to, if it was not entitled to anything at all.

Further, the corporation having no power to execute a mortgage if it was created under the provisions of Chapter XXV, and having the power to execute a mortgage, if it was created under the provisions of Chapter XXXV, the court is bound to presume, in the absence of allegation, that it lawfully exercised the power, namely that it was created under the provisions of the law which gave it the right to execute the mortgage.

We deem it important to call the attention of the court further to the authorities holding that the appellant mortgagor had no power to execute this mortgage if it was created under the provisions of Chapter XXV. The rule to which we appeal has been repeatedly declared by the Supreme Court of the United States and is asserted with unanimity by the text writers.

The rule prohibiting alienation in any form will be found expressed in

> Jones on Corporate Bonds and Mortgages, Secs. 2-3,

and, touching the subject of mortgages specially, the learned author of that work says, at Section 3:

> "Inasmuch as every mortgage may in the end result in an absolute transfer of the mortgaged property, it follows that such a corporation cannot, without special authority, mortgage its property and give to the mortgagee, upon default, the right to exercise its public duties and functions, or the power to sell and convey those privileges to another."

In

3 Wood's Railway Law, Sec. 455,

it is said:

> "It is now quite well settled that, without legislative authority, a railway company has no power to transfer its franchises, either absolutely or by way of mortgage, or its railway or 'permanent plant,' because this would enable the company to deprive itself of the power to discharge its public duties and to transfer to another the right to exercise those functions and privileges which the Legislature had conferred upon it."

This principle was declared and applied by the Supreme Court of the United States in the case of

Thomas vs. Railroad Co., 101 U. S., 71,

the court expressing its views in the following language:

> "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing these functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposed, is a violation of the contract with the State, and is void as against public policy."

To the same effect are

Pennsylvania R. R. Co. vs. St. Louis Co., 118 U. S., 290;

Branch vs. Jessup, 106 U. S. 468;

Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S. 24;

O. R. & N. Co. vs. Oregonian Co., 130 U. S. 1.

In Richardson vs. Sibley, 87 Am. Dec. 700,
the supreme court of Massachusetts held that a street railway company has no power to mortgage its franchise, rights or property, without legislative authority, and that a mortgage made without such authority is wholly void.

See also

Wood vs. Truckee Turn-pike Co., 24 Cal. 474;
Atlantic vs. Union Pacific Ry. Co., 1 Fed. 745-747.

In a recent case, the supreme court of California held that where a corporation secures a franchise, by municipal grant, to operate gas and electric works and to supply the inhabitants with the product, it becomes its legal duty so to do, and a lease of its works and privileges is *ultra vires*, and void as against public policy.

Visalia vs. Sims, 104 Cal. 331.

It may be contended that, by virtue of the provisions of Section 482, one of the sections of Chapter XXV, which provides, among other things, that every corporation formed under the provisions of that chapter has power to "hold, purchase, and convey such real and personal estate as the purposes of the corporation may require," the execution of the mortgage under consideration is justified in view of the use of the word "convey" in this section. But the authorities do not sustain this contention.

In one of the cases above cited the supreme court said:

> "A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to

> the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, *nor a general authority to sell and dispose of property*, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incoroprated by special charter from the Legislature, and to those formed by articles of association under general laws."
>
> Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S. 24-61.

The meaning of the statute last above referred to, giving corporations of this class power to convey their property, is expressed by the Supreme Court of the United States in

> Branch vs. Jessup, 106 U. S. 468,

in the following language:

> "Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad; and it does not extend to the sale of the railroad itself or of the franchises connected therewith."

In the case of

> Coe vs. Columbia R. R. Co., 10 Oh. St. 372,

a statute authorized the company to "acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the corporation." It will be perceived that this language is very similar in terms, and substantially identical in significance, with that part of Section 482 quoted above.

It was held in the case last above referred to that the statute considered did not authorize the corporation to transfer all of its property by one conveyance and thus practically put itself out of existence.

In Jones on Corporate Bonds and Mortgages, 3-4,

it is said:

> "Even when organized under a statute providing that the corporation may acquire and convey at pleasure all such real estate as may be necessary and convenient to carry into effect the object of the incorporation, a railroad company has no power to alienate its franchises to be a corporation, or the franchise to construct and maintain a railroad, and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held solely to and exclusively for the purpose of the exercise of such franchise."

The appellants refer in their brief to the case of

New Orleans vs. De La Mona, 114 U. S. 507-508,

in support of the contention that a railroad company may mortgage its road and subordinate franchises, but it clearly was not intended by that case to announce any rule at variance with that declared in the many cases above cited. It was assumed in that case that legislative sanction for the execution of the mortgage was not wanting.

It will have been observed also from the cases above cited, that it is not simply a question of ultra vires, but that a contract mortgaging or selling the property is void, as contrary to public policy.

Some claim is made in the brief of appellants to the

effect that the mortgagor appellant must be considered to have been created under the provisions of Chapter XXV, and not of Chapter XXXV, because it was engaged in furnishing gas and electricity as well as operating a street railway, but it will be noted that, by the authorities, a gas company or an electric light company, is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway company. Besides the business of furnishing gas and electric lights is as foreign to the business of a street railway company as it is to the business of a commercial railway company.

In the brief of appellants some argument was made to the effect that the mortgagor company had no franchise and did not mortgage any. It may possibly be contended along the same line that, having no franchise, there was no restriction upon its power to execute a mortgage. We think it was shown with sufficient clearness that the rights and privileges which the mortgagor company enjoyed by virtue of the ordinances of the City of Helena and the acts of the legislature of the state, are properly denominated "franchises," but that is not really the test. If it has *public duties to perform*, it cannot alienate its property by sale, lease or mortgage, without the express consent of the legislature. That the appelant mortgagor has public duties to perform is a proposition that canont be considered as seriously debatable.

In consideration of the street railway company's occupying the streets with its tracks and cars, it is obliged to perform the public duty of carrying the public on its cars,

and at such rates as the ordinance may prescribe. The ordinance granting it the right to occupy the streets is a contract within the protection of the federal constitution prohibiting the impairment of the obligation of contracts, as has been repeatedly declared by the Supreme Court of the United States. Even the appellants would not maintain that the tracks and cars of the appellant mortgagor, or its electric light wires strung in the streets, or its gas tanks in use, could be seized and sold upon execution.

Gregory vs. Blanchard, 98 Cal. 313.

If it had any property separate and apart from that in use in the performance of its public duty, such property could be seized upon execution and could be mortgaged or otherwise conveyed.

Risdon vs. Citizens, 122 Cal. 97.

At the argument some contention was made, notwithstanding the allegations of the complaint and the characterization of the instrument therein and in the decree as a mortgage, that it is not in fact a mortgage, but a trust deed, with a power of sale, and that the legal title to the property was by it conveyed to the appellant Central Trust Company in 1895. If this is the true construction to put upon this instrument, then it would appear that, notwithstanding the appellant Central Trust Company has owned the property since the year 1895, it allowed the appellant Helena Power and Light Company to manage and operate it under some arrangement existing between the two, the nature of which is not disclosed.

If this is true, then the Central Trust Company is, under all the authorities, liable for torts committed in the operation of the road by the Helena Power and Light Company.

Lee vs. Southern Pacific, 116 Cal. 97;
Balsley vs. St. Louis, 8 N. E. 859,

and its property is, of course, subject to answer for the obligation.

Lest it might possibly be overlooked by the court, as it apparently has been by the counsel for the appellants, we again call attention to the fact that the answer of the defendant Warren set up not only the judgment recovered by him against the Helena Power and Light Company, but averred further that the facts concerning the liability were as set out in his complaint in the action brought against the Helena Power and Light Company; and reference was made to a copy of the said complaint attached to the answer and made a part of it. The appellant Central Trust Company raised no issue whatever upon any of the allegations of the answer. It filed no replication, but moved for judgment upon the complaint and answer after its motion for judgment as in the complaint prayed, was by the court denied, asking just such a judgment as it got.

This procedure, upon settled principles, concedes the truth of the allegations made in the answer. It is, accordingly, admitted by the appellant Central Trust Company that the facts concerning the injuries suffered by the appellee and the circumstances under which he was injured, are as set out in his complaint in his action

against the appellant Helena Power and Light Company, a copy of which was attached to the answer.

The jurisdiction of this court has not been properly invoked, but if it had been, the appellants have no cause to complain of the decree in the particular in which it is alleged to be erroneous.

T. J. WALSH,
Counsel for Appellee.

R. R. PURCELL and
T. J. WALSH,
Solicitors for Appellee.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, of New York, (a corporation), and the HELENA POWER AND LIGHT COMPANY (a corporation),

Appellants.

vs.

JOHN W. WARREN,

Appellee.

REPLY BRIEF OF APPELLANTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
H. G. & S. H. McINTIRE,
Solicitors for Appellant Central Trust Company.
H. S. HEPNER,
Solicitor for Appellant Helena Power and Light Company

In the United States Circuit Court of Appeals

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Appellee.

REPLY BRIEF OF APPELLANTS.

At the conclusion of the oral argument of the above cause, on October 8, 1902, the court granted leave to the appellants to file a reply brief within six weeks from said date; in availing themselves of such permission appellants respectfully submit the following:

I.

As to appellee's motion to dismiss the appeal.

The hearing of this appeal was duly set for October 8, 1902. On October 3, 1902 at Helena, Montana, appellants were first served with notice that an application would be made on said October 8th to dismiss their appeal, and at the same time were served with a copy of appellee's brief herein. They had served their brief on appellee on August 27th, 1902. Owing to the shortness of the time between October 3rd and 8th it was impossible for appellants to prepare and have printed their brief in

reply. Rule 21, subdivisions 1 and 2, of this court, provides:

"All motions to the court shall be reduced to writing * * * and shall be served upon opposing counsel at least five days before the day noticed for the hearing.

"No motion to dismiss except on special assignment by the court, shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party." It is quite apparent that by the aforesaid rule this court intended that full five days notice of a motion should be given as a condition precedent to its consideration. In computing time where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation and the whole number of days or weeks must intervene before the day fixed for doing the second act.

Ward vs. Walters, 63 Wis., 39.

Garner vs. Johnson, 23 Ala., 494.

Excluding October 3rd, the day of service and October 8th, the day noticed for the hearing of the motion, there are but four days and consequently in this instance Rule 21 *supra* has not been complied with.

But if the court holds that it will consider the motion, then we submit there is no merit in it. The first ground is that this court has no jurisdiction to review a part of a decree, and Canter vs. Am. Ins. Co., 3 Peters 316 is cited as authority. In that case, as we understand it, an attempt was made

to have the Supreme Court review a matter of costs. Its applicability to the present case is not apparent. If the two Montana cases construing the then procedure of that state could be considered as having any bearing upon the procedure of this court, then it is only necessary to show that the same are no longer authority, see Bank vs. Fuqua, 11 Mont., 290. The rule in the Federal courts on this point is clearly stated by Mr. Foster in his work on Federal Practice (3rd Ed.) Vol. 2, sec. 503, p. 1204 as follows:

"Under the Federal Judiciary Acts a different definition of a final decree in equity has been made. For the purpose of appeals every decree is considered final which decides the right to property and orders that it be sold or delivered to the party, or creates a lien upon property by the issue of receiver's cetificates, or otherwise; or directs a specific sum of money to be paid to a party, or to an intervenor, although by a stranger to the suit or out of a fund in court, provided that the successful party is entitled to compel its immediate execution." See also the cases cited in note 9 to the said page.

In Central Trust Co. vs. Grant Locomotive Works, 135 U. S. 207 it is held that "A decree in a suit for foreclosing a railroad mortgage that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just, and entitled to priority over the debt secured by the mortgage, is a final decree, upon a matter distinct from the general subject of the litigation; and it cannot be vacated by the court of its own motion after the expiration of

the term at which it was granted," (Second syllabus) and as to the right of appeal from such a decree, the opinion in said case, pages 224, 225 holds:

"In Trustees v. Greenough, 105 U. S., 527, an appeal from an order for the allowance of costs and expenses to a complainant suing on behalf of a trust fund, was sustained. In Hinckley v. Gilman, Clinton & Springfield Railroad Company, 94 U. S., 467, a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In Williams v. Morgan, 111 U. S., 684, a decree in a foreclosure suit fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in Fosdick v. Schall, 99 U. S. 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see Farmers Loan & Trust Co., Petitioner, 129 U. S. 206, 213."

It is no ground of objection that an appeal is expressly limited to a part of the decree below, when this is the only part from which appellant could appeal.

Nashua Co. v. Boston Co. (1st C. C. A.) 61 Fed., 237.

And see 3 Desty Fed. Proc., p. 1567.

In Shiras Equity Practice (2nd Ed.) p. 117, the following is said: "If, however, the suit involves separable matters of controversy and the trial court determines them separately, an appeal may be taken from each de-

cree entered, which is final, with respect to the controversy affected by it."

The case of Eddy v. Letcher 57 Fed., 115 (8th C. C. A.) is like the case at bar. That was a foreclosure suit. In it an intervening petitioner was allowed damages for the negligent killing of her husband. The appeal was taken from the judgment rendered in favor of intervenor. It was sustained. The case was afterwards appealed to the Supreme Court which held that the judgment of the Circuit Court of Appeals was final. In the course of the opinion the Supreme Court said: "Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed" &c.

Rouse v. Letcher 156 U. S., 47.

In the case of Central Trust Co. v. Madden ,(4th C. C. A.) 70 Fed., 451, Chief Justice Fuller rendering the opinion, the first syllabus reads: "One M. filed an intervening petition in a railroad foreclosure suit claiming priority over the mortgage, for a judgment recovered by her against the railroad company for personal injuries, under the statute of South Carolina, giving priority to such judgments over mortgages. A decree was entered on such petition, adjudicating priority to the judgment, finding the amount due and decreeing that the priority must be secured in any order of sale of the railroad thereafter made. Held, that such decree substantially and completely determined the rights of the parties and was

appealable, though the main suit had not reached a final decree."

In Illinois Trust & Savings Bank v. Kilbourne (9th C. C. A.) 76 Fed., 887, the appeal was from part of the decree allowing intervenor's claim. True, the appeal was dismissed but on the sole ground that all the parties interested had not joined in the appeal. And in Coler v. Allen (9th C. C. A.) 114 Fed., 610, this court sustained and decided an appeal from a decree of the circuit court dismissing a bill in intervention which was sought to be interposed in a suit to foreclose a mortgage.

In considering this motion the court's attention is called to the prayer of appellee's answer, Record p. 49, which reads:

"Wherefore ,this answering defendant consents to an immediate sale of the property of the said defendant Helena Power and Light Company, as prayed for in the complaint, but respectfully prays that his said judgment may be adjudged to be a lien upon the property of the said defendant company within the county of Lewis and Clarke, State of Montana, superior to the lien of complainant's mortgage, and that it be decreed that out of the proceeds of the sale of the said property of the said defendant company the amount of the judgment of this answering defendant be first paid, together with his costs herein, and that this answering defendant have such other and further relief as to the court may seem just." There is no controversy between the parties as to the suit to foreclose. The decree is one by consent save as to the priority of Warren's claim. That was the

only matter litigated between the parties, and consequently is the only matter that could be brought to the attention of this court for review. The argument of appellee, Brief p. 3-4 is fallacious. It loses sight of the fact that as to the Helena Power and Light Company the decree foreclosing the mortgage or deed of trust was taken *pro confesso,* in other words everything in the decree except that allowing priority to appellee's claim was by consent. That the Central Trust Company has not "obtained substantially all the relief asked for by them" is apparent from the fact that the fund to which it is legally entitled to satisfy the claims of the bondholders whose bonds are secured by the deed of trust in question, is, by the decree of the circuit court, reduced in the substantial sum of $2,663.89 with eight per cent interest from April 8, 1902. See Record p. 69.

It is further said in said motion and in appellee's brief p. 4, that the decree has been enforced. This is an extraordinary statement in view of the record herein, pages 79-82. True, there has been a sale of the property covered by the mortgage or deed of trust which was foreclosed, but that is something entirely distinct from the controversy between appellants and appellee. Indeed, having consented to such sale, See Record p. 49, it is an anomalous position for appellee to assert that by reason of it the appellants are no longer in position to contest the priority of appellee's claim, a distinct and separable controversy altogether. The right to the present appeal can in no wise be affected by any of the proceedings in the main suit. This is clearly the law. See Central

Trust Co. v. Madden, 70 Fed., 452, 453, and the cases cited *supra.*

It is next claimed in the motion to dismiss that appellants have no right to join in the appeal. That they have such right is, however, settled beyond controversy.

See 2 Foster's Federal Practice, pp. 1218-1219 and the cases there referred to.

Indeed, it is the settled doctrine of this court, as announced in Illinois Trust Co. v. Kilbourne, 76 Fed., 887, and of all the Federal appellate courts that if all the parties affected by the judgment or decree do not join in the appeal, or are not made parties to it by proceedings in the nature of "summons and severance" the appeal will be dismissed on the court's own motion. It was by reason of this that the present appeal, No. 863, in addition to that referred to in appellee's brief p. 6, No. 839, was perfected. Of course this was proper.

2 Desty's Fed. Procedure sec. 545.

In Farmers Loan &c. Co. v. McClure (8th C. C. A.) 78 Fed., 211, it was explicitly held that the mortgagor in a foreclosure suit must join in an appeal, or be in some manner bound by the decision on appeal as he is so far interested in seeing to the disposition of the funds derived from the mortgaged property as to be an indispensable party to the proceedings on appeal, and this is self-evident. It is beyond the question to say that "it is a matter of absolute indifference" to the Helena Power and Light Company whether complainant or appellee shall be first paid out of the avails of the mortgaged property. The debt to the complainant is one founded on con-

tract, for moneys that doubtless went into the purchase and building up of the company's property; that of appellee is upon a judgment for the negligent acts of some careless employee; to the ordinary conscience the claim first mentioned would be deemed of higher sanctity. But aside from that the company has the right to prefer the one to the other. This is held by this court in Coler v. Allen 114 Fed., 609 and by the Supreme Court of Montana in Ames &c. Co. v. Heslett, 19 Mont., 188. Having, as they clearly have, under the authorities above cited, the right to join in the appeal, appellants had and have the right to join in the assignment of errors and in the bond on appeal. It would have been a foolish thing to have had two assignments of error, identical in character, and the law neither does nor requires useless things to be done. Besides the judgment awarding appellee priority is a joint judgment, it affects both appellants.

Masterson v. Herndon 10 Wall., 416.

2 Foster's Federal Practice p. 1218 *et seq.*

Appellee asserts that parties may not join in an assignment of error unless they join in the exception upon which it is founded, and further that the Helena Power and Light Company acquiesced in the decree in the court below, Brief pp. 6-7. This, too, is a fallacy. It confounds the decree in the main suit, the foreclosure proceeding, to which all the parties consented, with the controversy between appellants and appellee as to the latter's right of priority. To the judgment awarding this priority both appellants excepted in the circuit court; neither has ever acquiesced in it, there or elsewhere. This is abundantly

shown by the record, pages 75, *et seq.*, and by the attitude of the appellants on this appeal. The basis of the complaint here is not the denial of any motion in the circuit court but the rendition of a decree in favor of appellee awarding him priority as to his claim over that of the Central Trust Company. See the assignment of Errors, Record p. 75; the order allowing the appeal, Record p. 79; the bond on appeal, Record p. 82, and the Citation, Record p. 84.

Since writing the foregoing appellee has this 7th day of November furnished us with a copy of his supplemental brief. No additional reason is advanced in it to sustain the motion to dismiss, nor is any attempt made in it to show that as to the procedure in the Federal courts this appeal is not strictly in line with reason and precedent. Reference is made to the case of Farmers Bank v. Key, 33 Oregon, s. c. 54 Pac., 206, but the barest inspection of that case shows its inapplicability to the case at bar. Indeed, it is not apparent to appellants, how it can be suggested that as to matters of procedure in the Federal courts reference can or should be made to other than Federal authorities.

II.

Much is said in appellee's original brief to the effect that the Helena Power and Light Company is not formed under the provisions of Chapter XXV of the Compiled Statutes of Montana of 1887, but in the light of what we have said in our original brief, pages 13 to 20, and particularly in view of the observations of the Supreme Court of Montana as to this particular corporation being formed

under that chapter,—see the quotation on page 16 of our original brief,—there would seem to be little room left for further discussion on that point. Appellee apparently recognizes the force of this by asserting as he does in his supplemental brief, that such chapter XXV does not authorize the making of a mortgage by a corporation created thereunder. We will discuss this contention later on, taking up now the attempt which is made to escape the force and effect of the decision of this court in Massachusetts Loan & Trust Company v. Hamilton, 88 Fed., 589, on the ground that the street railway company there referred to was not a Montana corporation and consequently not bound by the provisions of section 707 of Chapter XXXV of such Compiled Statutes of Montana. In this connection it is said in said supplemental brief, page 4, "If it (the Helena Power and Light Company) was created under the provisions of Chapter XXXV the appellee's judgment is confessedly superior to the mortgage." No such concession has ever been made. It is not the law. Section 707 referred to uses the language, "a judgment against any railway company," &c. Having no application, as was decided by this Court in the Hamilton case to a street railway corporation created under other than the Montana statute, then it can have none to a Montana corporation, for in Montana we have the following Constitutional provision, Article XV, section 11:

"No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same, upon

whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

This provision has received a construction by the Supreme Court of that state (and consequently under numerous authorities the Federal courts will follow it) to the effect that any statute which imposes upon domestic companies a burden not imposed upon similar foreign corpanies operating within the state was annulled by the adoption of such constitutional provision and is consequently invalid as to domestic corporations. See Criswell v. Montana Central R. Co., 18 Mont., 167. In that case section 697 of said chapter XXXV which reads:

"That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him as if such servant or employe were a passenger," was under discussion. There is no difference in principle, so far as said section of the constitution is concerned, between that section and the one under discussion (707) and it must follow that as the one is invalid as imposing a burden upon a domestic company which a foreign company is not subjected to, then the other must also be invalid. This was adverted to on the oral argument, and it would seem that it does

away with the discussion as to what law the Helena Power and Light Company owes its creation.

III.

Assuming, then, that said company was created under the provisions of Chapter XXV, what is there in appellee's contention that that statute does not authorize companies formed thereunder from mortgaging their property? This contention is made for the first time in appellee's supplemental brief, and in view of the record in this case, it is, to say the least, somewhat extraordinary. It was not even suggested in the circuit court, appellee in his answer assailing not the validity of the mortgage but its priority to his claim and joining in the prayer that the same be foreclosed and the property covered thereby be sold to satisfy his claim, See Record p. 49. It is a familiar principle that one may not in the course of litigation occupy inconsistent positions, he may not blow hot and cold. Robb vs. Vos. 155 U. S. 13. In addition to this, it should be further observed that the decree adjudges (Record p. 59), that the bonds and the mortgage or deed of trust securing them were both executed by the Helena Power and Light Company in the "due exercise of its corporate power," and further (Record pp. 60-61), "That the said mortgage or deed of trust set forth in the bill of complaint * * * * is a valid and subsisting mortgage and constitutes a valid and subsisting lien upon the mortgaged property, premises and franchises subsequent only to the lien of the judgment of the defendant John W. Warren," &c. But aside from this there can be no serious question that a corporation created under

Chapter XXV of the Montana Compiled Statutes of 1887 had full power, under the statutes of that state as they existed in 1895, the date of this instrument, to borrow money for the purposes of the corporation and to secure the same by mortgage of its property. Reference is made in appellee's brief, page 7, only to section 482 of such Compiled Statutes, which, among other things, empowers corporations formed under that chapter "to sue and be sued * * * * to hold, purchase and convey such real and personal estate as the purposes of the corporation may require." This as we will show is sufficient to confer the right, but in addition to that we find section 447 of said statute which provides that persons incorporating themselves under that chapter shall be a body politic "in fact and in name, by the name stated in such certificate, and by that name have succession, and shall be capable of suing and being sued in any court of law or equity in this territory; and they and their successors may have a common seal, and may make and alter the same at pleasure, *and they shall*, by their corporate name, *be capable* in law *of acquiring by purchase*, pre-emption, donation, or otherwise, and holding or *conveying by deed or otherwise any real or personal estate whatever*, which may be necessary to enable the said company to carry on their operations named in the certificate," and the further distinct recognition and grant of the power to mortgage contained in section 1555, page 1073 of such Compiled Statutes, viz:

"That all mortgages or deeds of trust of both real and personal property within this territory *heretofore or here-*

after executed by any incorporated company, shall be governed by the law relating to mortgages or deeds of trust of real property, and be recorded in the office of the recorder of every county where any part of said property is situated, and the same *shall be valid* notwithstanding the possession of such property is retained by such person or persons, company or corporation; Provided, That any mortgage or deed of trust which shall be hereafter executed shall be accompanied by the affidavit specified in section 1 of the act entitled "An act concerning chattel mortgages" approved February 19, 1881 (section 1538 of the Compiled Statutes of Montana), and which said affidavit may be made on behalf of any such company or corporation by the president, secretary or managing agent thereof." (The instrument in question is executed in compliance with this provision, See Record pp. 41-42.) Under this latter section, the right is unquestionable. But under sections 447 and 482 referred to *supra* the power exists.

There the right to sell, to convey, is granted, and the rule is that where such right exists it includes the right to mortgage, which is a sale with a defeasance, or, as in the case at bar, to give a deed of trust, which under the Montana decisions is a conveyance of the legal title. First Nat. Bank v. Bell, &c. Co., 8 Mont., 32 which follows the doctrine of Koch v. Briggs, 14 Cal., 265 and Fogarty v. Sawyer, 17 Cal., 589, and which case (that from Montana) was affirmed in Bell v. Butte Bank 156 U. S., 476.

In 3 Cook on Corporations (4th Ed.) sec. 779 we find the

following: "A corporation, other than a railroad corporation, may mortgage its real estate and personal property for the purposes of securing its bonds or other evidences of indebtedness, unless there is some provisions in its charter expressly prohibiting or regulating this right. The right to mortgage is a natural result of the right to incur an indebtedness."

And in section 783 of the same work the following:

"If the charter authorizes the corporation to sell, this is sufficient authority to mortgage. Power to sell implies the power to mortgage."

And in the foot-note to the last section, the following:

"Express power given to sell gives also power to mortgage., Willamette etc. Co. v. Bank etc., 119 U. S. 191 (1886); McAllister v. Plant, 54 Miss., 106 (1876). Power to "transfer" the property, gives power to mortgage it. Dunham v. Isett, 15 Iowa, 284 (1863). Power to sell gives power to mortgage. Bickford v. Grand Junction Ry., 1 Can. Sup. Ct., 696, 736 (1877). Power to "Transfer all its property, rights, privileges and franchises" gives power to mortgage. East Boston etc. R. R. Co. v. Eastern R. R., 95 Mass., 422 (1866). Power to sell gives power to mortgage. Branch v. Atlantic etc R. R. 3 Woods, 481 (1879); S. C. 4 Fed. Cas. 12. Power to mortgage gives power to sell at foreclosure sale the right of way, franchises, etc. New Orleans etc. R. R. v. Delamore, 114 U. S. 501 (1885). *Under the general statutes authorizing every corporation to mortgage its real and personal property, a street railway company may mortgage its street railway.* Hovelman v. Kansas City H. R. R., 79 Mo., 632 (1883)."

Appellee's contention seems to be that a corporation which exercises *quasi* public functions may not mortgage its property without legislative consent, and he says, brief, page 10, that "by the authorities, a gas company or an electric light company, is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway company," and further, on the same page of his brief, he says: "If it has *public duties to perform*, it cannot alienate its property by sale, lease or mortgage without the express consent of the legislature. That the appellant mortgagor has public duties to perform is a proposition that cannot be considered as seriously debatable. In consideration of the street railway company's occupying the streets with its tracks and cars, it is obliged to perform the public duty of carrying the public on its cars."

Now we have shown that in the case of State ex rel Knight v. Helena Power and Light Company, 22 Mont., 391, that the Supreme Court of the state as to this particular company decided that the right it possessed to occupy the streets of the city of Helena was a license merely and was not the grant of a franchise which imposed upon the company the duty to maintain and operate its line. If it could abandon this right, as it was there held, it must be conceded that it could sell or mortgage it. The powers of eminent domain, etc., the grant of which are considered as the reason for the rule prohibiting railroads from alienating their property, do not exist in this company.

In the said Knight case (22 Mont., 393) the Supreme

Court of Montana uses the following language:

"Is the operation of the line of street railway which respondent has abandoned an act specially enjoined as a legal duty. We think it is not. It does not appear that the charter of respondent or the statute under which it was organized, requires it to maintain or operate a line of railway; nor is it claimed that the State has delegated to respondent the right to exercise the power of eminent domain." The reason for the rule ceasing the rule itself ceases, consequently appellee's position from that standpoint is also untenable. Again, if we take the test he seeks to apply, i. e. that "a gas company or an electric light company is subject to exactly the same restrictions in the matter of executing mortgages upon its property as is a street railway," and we admit we can see no reason why such is not the law, then we find that no such restriction exists on companies carrying on the gas or electric lighting business. Probably the latest case on the subject is that of Hunt v. Memphis Gas Light Co., 95 Tenn., s. c. 31 S. W. Rep., 1007 from which, because of its cogency and the collection of authorities that is there made we make the following quotation:

"It is insisted by complainants that corporations to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantages, are impliedly restrained in their power of alienation, railroad companies falling in this class; and it is insisted that gas companies are quasi public corporations, and are governed by the same rules, and in the absence of legislative authority, cannot exe-

cute a valid mortgage. Many authorities are cited by counsel for complainants, and much reliance is placed upon the case of Portland Natural Gas & Oil Co. v. State, an opinion by the Supreme Court of Indiana, reported in 8 Am. R. & Corp. Rep., 640 (34 N. E. 818), and the note thereto. All of these authorities have been carefully considered; and none of them support the contention of counsel for complainants to the extent claimed. They mainly discuss the question whether or not gas companies, water companies, and the like are quasi corporations, and some of the cases so hold. Some of them place the holding upon the ground that the right of eminent domain had been conferred upon the corporation, which is not the case with regard to the Memphis Gas Light Company; and others, again, place the decision upon the ground of an exclusive pirvilege given the company to occupy the streets, alleys, lanes, etc., of a city; thus practically giving it, in such case a monopoly of supplying the city with gas. In the case of Gas Company v. Williamson, 9 Heisk. 314, it was held by this court, in 1872, that it was not the intention of the legislature in the act incorporating the Memphis Gaslight Company, to confer the exclusive right to manufacture gas in that city. It thus appears that there are material differences between the case at bar, and those relied upon by the complainants. None of the authorities, however, hold that a gas company is without power to execute a mortgage.

"It is said by the Supreme Court of the United States, at an early day, that "it is well settled that a corporation, without special authority, may dispose of the lands,

goods and chattels, or any interest in the same, as it deems expedient, and in the course of their legitimate business, may make a bond, mortgage bond, note or draft; and also make composition with creditors or an assignment for their benefit with preferences, except when restrained by law." Canal Co. v. Valette, 21 How., 424. This language is quoted with approval by this court in Adams v. Railroad Company, 2 Cold. 645, 660. As was said in a subsequent case in respect to Adams v. Railroad Company: "The simple question presented was, had the mayor and aldermen of the city of Memphis the power, under their charter, to mortgage their real property or estate for corporation purposes?" And the court decided it had. McKinney v. Hotel Co., 12 Heisk. 104-120. A municipal corporation is confessedly a public corporation; and if the power to mortgage is enjoyed by a municipality, it is difficult to perceive upon what principle of public policy this power should be denied a gas company, even though it is a quasi public corporation. In 2 Cook Stock., Stockh. & Corp. Law, sec. 779, at page 1261, it is said: "A corporation, other than railroad corporations may mortgage its real estate and personal property for the purposes of securing its bonds or other evidence of debt, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is the natural result of the right to incur a debt." Numerous cases are cited in the note; and further on, discussing the same subject under the title "Gas Companies," the same author says: "A gas company may give a mortgage on its plant." Section 927,

p. 1262. Mr. Beach lays down the doctrine broadly that all corporations unless restrained by their charters, have implied power to mortgage," the only exception being that of railroads." 2 Beach Priv. Corp. secs. 388, 389, 738, et seq. To the same effect, see Jones Mortg. sec. 124; Mor. Priv. Corp. sec. 346; Detroit v. Mutual Gaslight Co., 43 Mich. 594, 5 N. W. 1039; Hays v. Gas Co., 29 Ohio St. 330. Though the authorities in other states agree in holding that a railroad corporation, owing to the peculiar relation which it bears to the public, should be denied the right to execute a mortgage, unless it has express legislative authority therefor, yet as a matter of fact, this power is always conferred; and indeed, it is doubtful whether a railroad could be successfully operated without the power to mortgage. Thus, the practical results of business have demonstrated the unsoundness of the reasoning on which the principle was established that it was against public policy to confer upon railroad corporations the power to execute mortgage or trust deeds."

"Our conclusion is that the Memphis Gaslight Company was authorized to execute the mortgage in question. This conclusion renders it unnecessary to consider the effect of the act of 1885, conferring upon certain corpora tions the power to execute mortgage o rtrust deeds."

In People v. Mutual Gaslight Co., 38 Mich., 154, it was held that the right of a gas company to pay pipes in a street under permission of the municipal government is not a state franchise but a local easement, resting in contract or license. The only case, other than those of commercial railroad companies which appellee has cited is

that of Richardson v. Sibley, 11 Allen 65, s. c. 87 Am. Dec., 700, but as to that case the Supreme Court of Massachusetts in 1892 in the case of Evans v. Boston &c. Co., 31 N. E. Rep., 698 says as follows: "In Richardson v. Sibley, 11 Allen, 65 it was held under St. 1864 C. 229 sec. 24, providing that 'no street railway corporation shall lease or sell its road or property, unless authorized so to do by its charter, or by special act of the legislature' that such a corporation could not mortgage its property." It consequently cannot be considered as of any pertinency to the case at bar where such statutes as those of Montana are applicable.

Again, if not upon its face beyond the corporate authority, a contract will be presumed to be valid.

Union Water Co. v. Murphy's Flat &c. Co., 22 Cal. 620.

Aurora &c. Soc. v. Paddock, 80 Ill., 263.

Not only, we submit, has this presumption as to the validity of the instrument in question not been rebutted, but its due execution has been shown by both general law and express statutory authority.

IV.

In our original brief herein on pages 21 and 22 we asserted that such "franchises" as are included in the deed of trust under discussion could not, in the nature of things, be such as might be within the purview of section 17 of Article XV of the Montana Constitution, and we cited a number of authorities to sustain that contention. Much has been said in opposition to this by appellee in his original brief. A consideration of the cases he cites,

however, and additional ones that we have found only strengthen our position. By reference to the brief of counsel for appellants in the case of State ex rel Knight v. Helena Power and Light Company, 22 Mont., 391-393, it will be seen that the points and many of the authorities set forth in appellee's original brief, pages 13-15, particularly to the effect that the privilege to occupy the streets and operate a street railway line thereon was a contract; that the consideration and benefit to the public supporting this contract was the continued operation of the road (to sustain which latter proposition Article XV sec. 17 of the Montana Constitution was cited *inter alia*) were all urged upon the attention of the Montana Supreme Court, and yet the Supreme Court held such grant a permission or license, merely, which might be abandoned by the company, which it was under no legal obligation to continue to exercise. In the light of this decision it seems idle to assert that such franchise is non-alienable unless the conveyance thereof be coupled with the obligation to answer for all liabilities past and present of the conveying company. The Supreme Court of Washington, which it will be remembered has substantially the same Constitutional provision as that of Montana, in discussing the nature of such an easement says:

"The Tacoma Electric Company did not assign or transfer any franchise or privilege granted to it by the state. It simply assigned to respondent a privilege which the city, in plain terms, had granted to it and its assigns; and that right, in our judgment, was included in that class of property which the statute provides may be

bought, held, mortgaged, sold, and conveyed by a corporation organized in accordance with the laws of this state. 1 Hill's Code, sec. 1500; Klosterman v. Railroad Co., 8 Wash., 281, 36 Pac. 136; Hovelman v. Railroad Co., 79 Mo., 632; Willamette Woolen Manfg. Co., v. Bank of British Columbia, 119 U. S., 191, 7 Sup. Ct., 187. In People v. Mutual Gaslight Co., 38 Mich., 154, it was held that the right of a gas company to lay pipes in a street under permission of the municipal government is not a state franchise, but a local easement, resting in contract or license. The same principle of course applies to the right to erect and maintain electric poles and wires in the streets under a municipal grant."

Commercial Electric Light & Power Co. v. City of Tacoma, 50 Pac., 592, 594.

And again, we repeat the following language from Klosterman v. Mason Co. C. R. R. 8 Wash., 281, s. c. 36 Pac. 136:

"In this case there is no showing that the appellant corporation ever acquired any of its property except by purchase and under those circumstances it was under no obligation to the public to retain its property or to continue its business longer than it deemed it expedient to do so." This applies to the situation of the appellant corporation here, and, it is submitted, that in the light of those authorities the argument of appellee to the effect "It (Const. Art. XV sec. 17) means that the legislature may authorize corporations holding franchises, as it might before the constitution, to convey property held by them subject to public uses, but that any law permitting them

to do so, must be subject to the provision that the property in the hands of the alienee should remain subject to any debts incurred by its predecessor in the operation, use and enjoyment of the property (that is, the property should not be relieved of the liability) and the original owner should remain liable for torts committed by the party into whose charge or possession it placed the property," page 18 of his original brief, is wholly untenable. Such argument would necessarily, if carried to its logical extent, leave a vendor company responsible for all liabilities that might at any time be incurred by the vendee. Indeed, if we understand him, that is precisely what appellee asserts in the above quoted passage from his brief. The bare statement of the proposition shows its absurdity.

Again, appellee asserts that we do not attempt to enlighten the court upon the question of the meaning of said section. We thought we did so by the quotations from the cases cited in our original brief on pages 27-29. But if there is any doubt upon that point, appellee has cited a case in his reply brief, Lee v. Southern Pac. R. R. Co., 116 Cal., 97, s. c. 47., 932 (he cites it upon another point, however) in which the following language is used:

"Section 10 of Article 12 of the constitution declares: 'The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment or such franchise, or any of its privileges.' Upon this language appellant contends that the constitution gives one a right

of action against the corporation which has owend property for an injury which has resulted to him in the use of such property in the hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the constitution itself. The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority. Abbot v. Railroad Co., 80 N. Y. 27; Railway Co. v. Morris, 68 Tex., 49, 3 S. W. 457. It declares: (1) That, if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property *cum onere, subject to any of the liabilities of the grantor at the time existing and enforcable against the franchise or property.* This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leavngi remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover."

In the language of the Supreme Court of Washington in Klosterman v. Mason Co. R. R. Co., *supra*, "We do not think that there is anything in the law, or this provision of the Constitution wihch inhibits a corporation from voluntarily transferring property for the payment of debts

for which the property so transferred is legally bound."

V.

It is next said in appellee's supplemental brief that if the title of the property passed at the date of the deed of trust under consideration, the Central Trust Company would be liable for the torts of the Helena Power and Light Company in the operation of such property. How such a doctrine could be applied to such a conveyance as this is not clear. No authorities are cited to support it. Those cited by appellee relate only to leases. But even if it could be successfully maintained, then it would necessitate a law action against the Central Trust Company and a judgment therein. There is no pretense that this has been done. It is said, however, that the Central Trust Company has admitted the truth of the allegations of the answer. This is tenable, only, to the extent that Warren obtained a judgment against the Helena Power and Light Company for personal injuries in 1901; that the liability which was the foundation of such judgment was incurred by said last named company in the operation of the franchises granted to it by the city of Helena and that the facts constituting said liability were set out in his complaint in the state court against said Helena Power and Light Company. See Record page 48.

No reason is advanced by appellee to support the judgment in his favor.

It is therefore respectfully submitted that both by reason and authority appellee's judgment in the state court is not superior to the claim of the Central Trust Company,

that the circuit court erred in holding otherwise, and that it should be reversed.

Helena, November 10, 1902.

BUTLER, NOTMAN, JOLINE & MYNDERSE,

H. G. & S. H. McINTIRE,

Solicitors for Appellant Central Trust Company.

H. S. HEPNER,

Solicitor for Appellant Helena Power and Light Company

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE CENTRAL TRUST COMPANY, OF NEW YORK, (A CORPORATION) AND THE HELENA POWER AND LIGHT COMPANY (A CORPORATION.)

Appellants.

VS.

JOHN W. WARREN,

Appellee.

PETITION FOR RE-HEARING.

T. J. WALSH,
Counsel for Appellee.

Naegele & Co., Printers, Helena, Montana.

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Appellants.

VS.

JOHN W. WARREN,

Appellee.

PETITION FOR RE-HEARING.

The above named appellee, John W. Warren, hereby respectfully petitions the court to grant a re-hearing of this cause, for that:

1. The court evidently overlooked appellee's motion to dismiss the appeal.

2. The court evidently overlooked the argument made by appellee in his supplemental brief to the effect that even though it should be held that the mortgagor

corporation was organized under the provisions of Chapter XXV of the Compiled Statutes of the State of Montana, it had no authority to execute the mortgage sought to be foreclosed, and for that reason the judgment cannot be reversed.

This petition is printed pursuant to the rules of the court, together with an argument in support of the same.

R. R. PURCELL,

and

T. J. WALSH,

Solicitors for Appellee.

I hereby certify that in my judgment the foregoing petition for re-hearing is well founded, and that it is not interposed for delay.

T. J. WALSH,

Counsel for Appellee.

ARGUMENT.

I.

The opinion filed by the court reversing the judgment herein, makes no mention whatever of the motion filed by appellee to dismiss the appeal, and it has been assumed, consequently, that the motion has not been acted upon. The motion was filed, and before the argument commenced counsel for the appellee called the attention of the court to it, and the court announced that it might be presented with the main case. It was so presented, and subsequently, under leave of the court, appellee filed a supplemental brief in which the attention of the court

was called to another authority directly in point, and some additional argument was furnished. The views of the appellants were expressed in a further brief filed by them later, upon leave of the court.

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At the argument and in the brief the appellants objected to the consideration of the motion to dismiss the appeal, upon the ground that sufficient notice of the motion had not been given to them, as required by the rules of the court, five days' notice being required. It may be, although the court said nothing about the matter, that it took the view urged by the appellants that sufficient notice had not been given. The notice was served on the 3rd day of October, and advised the appellants that the motion would be brought on for hearing on the 8th. The appellants insist that both the 3rd day and the 8th day of October must be excluded in computing the time, and that consequently but four days' notice was given. The overwhelming weight of authority is against this contention. The rule of computation now almost universally declared is expressed in the Code of Civil Procedure of Montana in the following terms:

"Sec. 3459. The time in which any act provided by law is to be done is computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded."

Applying this rule, it was held in

Young vs. Krueger, 92 Wis., 361,

that a summons served on the 11th of the month, return-

able on the 17th, is served six days before the return day; by the supreme court of Minnesota that six days' notice is given when the summons is served on the 11th, returnable on the 17th,

Smith vs. Force, 31 Minn., 119;

by the supreme court of New Jersey that five days' service of summons is satisfied by service on the 26th of April of a summons returnable on the first day of May,

Day vs. Hall, 12 N. J. L., 203;

by the supreme court of Indiana that a writ served on the 5th of January, returnable on the 15th, gives ten days' notice,

Reigelsberger vs. Stapp, 91 Ind., 311.

Notice of trial served on the 9th, for trial on the 19th, is sufficient under the requirement of ten days' notice for trial.

II Tidd's Practice, 755.

Notice posted on the 12th of July of an order returnable on the 22nd of the same month is sufficient as a ten days' notice under the statutory rule.

Bates vs. Howard, 105 Cal., 173.

Notice of trial served October 10th for a term of court beginning October 18th is a sufficient eight days' notice.

State ex rel. Curry vs. Weld, 39 Minn., 426.

These references might be multiplied indefinitely.

This rule of computation has been applied by the Supreme Court of the United States in

Siddons vs. Bogart, 18 How., 158,

and by the circuit court in

The Vigilancia, 68 Fed., 783.

Unless there is something exceptional in the language of the statute, or a rule which compels both the first and the last day to be excluded in the computation, it will not be done. Such was the case in the authorities cited by the appellants in support of their contention, at page 2 of their brief.

The notice was unquestionably served in time, but, as the objection touches the jurisdiction of the court over the subject matter, it would make no difference even though it had not been served at all, and the attention of the court had been called to the difficulty for the first time at the hearing.

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The principal ground urged in support of the motion to dismiss the appeal was that the appeal is taken from a part of the judgment, and that no appeal lies from a part of a judgment. The original brief of appellee opened with a discussion of this proposition. (See same, pages 1-5.)

Section 6 of the act of congress approved March 3, 1891, provides "that the circuit court of appeals established by this act shall exercise appellate jurisdiction

to review by appeal, or by writ of error, final decision in the district court and the existing circuit courts."

Attention was called in the original brief to two decisions of the Supreme Court of Montana squarely in point on this proposition, and a decision from the State of Ohio equally direct; and in the supplemental brief filed, reference was made to the case of

Farmers' Bank vs. Key, 33 Or., 443,

also a direct authority. The Supreme Court of the Territory of Montana based its opinion on the language of the opinion in

Canter vs. American Ins. Co., 3 Peters, 316,

and its views on the subject were expressed in the following language:

"When an appeal is taken from a judgment, it must be taken from the whole of it. The statute does not authorize the taking of a judgment into an appellate court for review by piecemeal. The appeal must bring the whole judgment before the appellate court. This court cannot reverse or affirm the fragment of a judgment. Jurisdiction for this purpose has not been conferred. * * * We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment, unless the whole judgment is before it. The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

The appellants in their reply brief say that they are at a loss to understand "how it can be suggested that, as to matters of procedure in federal courts, reference can or should be made to other than federal authorities,"

(page 10) and in that connection they say, with reference to the case of Farmers' Bank vs. Key, *supra,* (a case, as stated, directly in point) "the barest inspection of that case shows its inapplicability to the case at bar." This is simply a question of the construction of a statute. It is not a question of procedure in the federal court as distinguished from procedure in the state courts. The question is simply whether when the statute permits an appeal to be taken from "final judgment" it permits an appeal to be taken from "a part of a final judgment." Section 1869 of the Revised Statutes of the United States, conferred jurisdiction upon the Supreme Court of the Territory of Montana, at the time of the decision in

Barkley vs. Logan, 2 Mont., 296, and

Plaisted vs. Nowlan, 2 Mont., 359,

the cases above referred to, in which it was held that an appeal from a portion of a decree or final judgment is not authorized by the statute and cannot be maintained. The section referred to reads as follows:

"Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme courts of all the territories respectively."

The territorial statute provided that an appeal might be taken "from a final judgment."

In the case of Farmers' Bank vs. Key, the court said:

"The appeal must bring up the whole judgment, in order to give the court jurisdiction over any part of it.

On such an appeal the court may reverse, modify, or affirm the judgment appealed from in the respect mentioned in the notice, and may also review any intermediate order involving the merits, and necessarily affecting the judgment. Hill's Ann. Laws, Sections 544, 545. The proper practice in the case at bar would have been for the plaintiff to have appealed from the whole of the final judgment in the court below, assigning as error the intermediate order dissolving the attachment, and the refusal of the court to order a sale of the attached property in the judgment, and any other alleged error upon which it expected to rely on such an appeal. But it cannot give this court jurisdiction to review that portion adverse to it without appealing from the whole judgment. Crawford v. Roberts, 8 Or., 325; Sheppard v. Yocum, 11 Or., 234, 3 Pac., 824; Van Voories v. Taylor, 24 Or., 247, 33 Pac., 380; Bush v. Mitchell, 28 Or., 92, 41 Pac., 155; Barkley v. Logan, 2 Mont., 296. It follows that the appeal must be dismissed, and it is so ordered."

In the reply brief of the appellants it is said that the cases above referred to from the Supreme Court of Montana are no longer authority in that state, and the case of

Bank. vs. Fuqua, 11 Mont., 290,

is referred to in support of this statement.

The doctrine of these cases is affirmed in Bank vs. Fuqua, but attention is called in that case to the fact that the statute has been since changed so as to permit an appeal from a part of a judgment. It is expressly so stated in the opinion, and the statute in force after the admission of the state into the Union, is quoted as follows:

"An appeal may be taken to the supreme court in the following cases: first, from a final judgment, or *any*

part thereof, entered in an action or a special proceeding commenced in those courts, or brought into those courts from other courts."

It is apparent that the legislature considered that it would be necessary to incorporate in the statute the language, "or any part thereof," in order to permit an appeal from a part of a judgment. The case, instead of denying the contention of appellee, strongly reenforces it. In fact, the appellants have not called to the attention of the court a single case holding to the contrary, and it may with safety be asserted that there are none.

In Nashua vs. Boston, 51 Fed., 929, an appeal had been taken from a part of a judgment, and a motion was made to dismiss on other grounds. At the hearing the appellee filed another motion specifying that the appeal was taken from a part of the judgment only, but the court refused to consider this motion because filed without leave of court. The question was evidently not considered by the court, though they remarked in passing that the party had appealed only from the part he complained of.

With a purpose evidently to obscure the question, the reply brief enters into a lengthy consideration of what judgments are and what are not final judgments, so as to be subject to appeal, and as to the necessity of joining all of the parties in the appeal. A large number of cases are cited upon these questions, all of which are beside the question to be considered by the court. To illustrate: The case of

Central Trust Co. vs. Grant Locomotive Works, 135 U. S., 207,

is referred to, in which it is held that:

"A decree in a suit for foreclosing a railroad mortgage that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road, was just and entitled to priority over the debt secured by the mortgage, is a final decree upon a matter distinct from the general subject of the litigation; and it cannot be vacated by the court of its own motion after the expiration of the term at which it was granted."

No attempt was made to take an appeal from any part of that decree. The question before the court was simply as to whether it was a final decree, and so not subject to modification by the court after the close of the term at which it was made. Reference was made to the case of Trustees vs. Greenough, in which an appeal was allowed from an order for the allowance of costs and expenses to a complainant suing on behalf of the trust fund, but that was the whole of the order. The entire order was appealed from. So in Hinckley vs. Gilman a receiver was allowed to appeal from a decree against him to pay a sum of money in a cause in which he was appointed. He appealed from the whole of this decree.

In Fosdick vs. Schall an appeal was taken from a decree upon an intervening petition in respect to certain cars used by a railroad company, but the appeal was taken from the whole of that decree. The case of

Eddy vs. Letcher, 57 Fed., 115,

is referred to. In that case, which was a foreclosure suit, an intervening petitioner was allowed damages for the negligent killing of her husband. An appeal was taken from the judgment and it was sustained. This was held to be a final judgment, and the supreme court said, "nor can the conclusion be otherwise, because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed."

That is to say, that if there are several decrees in the same suit upon intervening petitions or otherwise, an appeal may be prosecuted from each separate decree, assuming that it is final. There are no separate decrees in this case. There is only one decree.

The case of

Central Trust Co. vs. Madden, 70 Fed., 451,

is of the same nature. In that case a judgment creditor applied to the court in a foreclosure action before the entry of the decree of foreclosure, asking that his judgment be decreed to be superior to the lien of the mortgage, and directing that it be paid. Such an order was made, and from that order an appeal was taken. The appeal was taken from the whole order that had been made.

It is said in the brief, at page 6, that in

Illinois vs. Kilbourne, 76 Fed., 887,

an appeal was taken from a part of the decree allowing intervenor's claim. It appears clearly from the opinion

that the appeal in that case was taken from the whole of the decree allowing intervenor's claim, this appeal having been entered before any decree of foreclosure.

We repeat that not one single case has been cited in which it was held that an appeal would lie from a part of a decree. The almost universal recognition of this rule of law finds expression in the language ordinarily used in speaking of the action of the appellate tribunal. Thus, in the opinion filed in this cause, the court says:

"The decree of the circuit court is reversed in so far as it provides that a judgment in favor of the appellee is a lien upon the real property of the Helena Power and Light Company, and a lien on the mortgage or deed of trust of the Central Trust Company of New York."

The court does not say "that part of the decree" is reversed, but the "decree is reversed" as to that part. This court could hardly reverse the decree, because the decree is not before it on this appeal. Thus the Supreme Court of Montana said:

"We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment unless the *whole judgment is before it.* The whole judgment must be appealed from to give this court jurisdiction over any particular portion."

"The decree is not here, so that we can notice it," and again, "we cannot modify it while the main portion of the judgment is in the district court and subject to its jurisdiction."

In the supplemental brief, we referred to the fact that the authorities hold that a party has no right to

complain of a portion of a decree which does not affect his interests, and that if a party appeals from a decree he cannot be heard in the appellate tribunal to urge that it is erroneous except in those parts which affect him. This does not give him the right to appeal from a part of a decree, as appeal must be taken from the whole decree, and then, in the language of the opinion in this case, the decree will be reversed as to that part by which his interests are affected.

The reply brief of the appellants calls attention to the prayer of the appellee's answer, and argues that by reason of some admissions made therein this motion to dismiss the appeal cannot be granted. No admissions made by the appellee could confer jurisdiction upon this court to review a part of a judgment unless the statute gave it that power.

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Another objection urged to this appeal is that the complainant, Central Trust Company, and the defendant, Helena Power and Light Company, have no right to join in this appeal. The appellants seem to labor under the belief that we are urging that the appellant Helena Power and Light Company is not a proper party to the appeal. That it is a necessary party is not open to doubt or question, upon the authorities. If the Central Trust Company desired to take an appeal from this decree, it could do so by making the Helena Power and Light Company and Warren appellees. If the Helena Power and Light Company desired to take an appeal

it could do so by making the Central Trust Company and Warren appellees. But there is no right whatever in the Central Trust Company and the Helena Power and Light Company to join in an appeal. They have no joint rights.

We also urged, not as a ground for dismissing the appeal, but also as a reason why the court could not review the matters urged, that the Central Trust Company and the Helena Power and Light Company had made a joint assignment of errors, and that a joint assignment of errors could not be made unless a joint exception had been taken below, and that no exception whatever to the decree was taken by the Helena Power and Light Company, nor was any exception taken by the Helena Power and Light Company to the order of the court denying the motion of the Central Trust Company for a decree in accordance with the prayer of its complaint, notwithstanding the answer of Warren. A discussion of this subject will be found at pages 5 to 7, inclusive, of the original brief. The attempted answer to this is found at pages 9 and 10 of the appellants' reply brief. The principles contended for and the authorities are not disputed, but it is said that the claim "confounds the decree in the main suit of the foreclosure proceeding, to which all the parties consented, with the controversy between appellants and appellee as to the latter's right of priority."

W must confess that we do not understand what is meant by the expression "main suit." There is only one suit here. If the action had been begun by the

Central Trust Company against the Helena Power and Light Company, and subsequently Warren had intervened, it might be proper enough to speak of the original action as the "main suit." If, on such intervention, a decree had been rendered in his favor, adjudging the lien of his judgment to be prior to that of the mortgage, and directing the receiver to pay it, and such decree had been entered prior to the decree of foreclosure, an appeal would unquestionably lie from that order under the authorities cited in the appellants' brief; but there is but one action here, and the expression "main suit" has no significance whatever.

It is said also in the same connection that to the judgment awarding this priority both appellants excepted in the circuit court. The record does not sustain this contention. The Helena Power and Light Company was not represented. It was not there at all.

Then on page 10 it is said, "the basis of the complaint here is, not the denial of any motion in the circuit court, but the rendition of a decree in favor of appellee awarding him priority." If the court will turn to the assignment of errors, it will find that the first assignment of error is as follows:

"The court erred in denying the motion of the complainant for a decree in its favor as prayed for in its bill of complaint, notwithstanding the answer of the defendant John W. Warren, because the said answer contains and presents no defense to such bill of complaint."

The motion referred to in this assignment was not served upon the Helena Power and Light Company, it

was not present at the hearing of the motion, it took no part in the same, it made no objection to the court's denial of the motion, and it is incorrect to state that it excepted to the ruling of the court below.

II.

The court reaches the conclusion that the Helena Power and Light Company was not organized under the provisions of Chapter XXXV, but of Chapter XXV, the language of which is sufficiently comprehensive to permit of the incorporation of a street railway company. With this conclusion, upon this application for a re-hearing, we have no controversy. That we accept as a settled proposition, but we insisted at the argument that if the company was to be deemed to have been incorporated under the provisions of Chapter XXV, the mortgage of the complainant is altogether void, because no authority is given by the provisions of that chapter to the corporation to execute a mortgage upon its property, and in view of the nature of the corporation, its business and its property, it has no power to execute a mortgage upon its entire plant except by express legislative authority.

We obtained leave of the court to file a brief presenting this consideration, and it was subsequently served and filed. Inasmuch, however, as the subject matter is not adverted to in the opinion of the court at all, and it is assumed that the controversy is disposed of when the conclusion is reached that the company was organized under the provisions of Chapter XXV, we assume that by some accident the supplemental brief did not come

into the hands of the court. In it we presented the proposition that "corporations *having public duties to perform,* such as railway companies, canal companies, turn-pike companies, gas-light companies and the like," have no power or authority to mortgage their franchises or any of their property necessary to discharge those public duties, except by express permission of the legislature.

4 Thompson's Commentaries, 5355-5356.

We called the attention of the court to the rule laid down in

Jones on Corporate Bonds and Mortgages, Secs. 2-3,

denying to a corporation of that character the right to alienate in any form property necessary to the discharge of its public functions, and to the authority of Wood's Railway Law, to the same effect, and to a long line of cases in the Supreme Court of the United States, commencing with

Thomas vs. Railroad Co., 101 U. S., 71,

in which these principles were applied. We referred the court to the case of

Richardson vs. Sibley, 87 Am. Dec., 700,

in which the Supreme Court of Massachusetts held that a street railway company has no power to mortgage its rights, franchise or property without legislative authority; and to the case of

Visalia vs. Sims, 104 Cal., 331,

in which the principle was applied to an alienation made by a company organized to operate gas and electric works, and which had obtained a franchise or license from the municipal authorities. We feel impelled to believe, inasmuch as no reference is made in the opinion to these questions at all, that by some accident the argument in which they were presented for the consideration of the court did not come under its notice.

We most respectfully insist that the position is well founded in law, and that no convincing reasons are urged in the reply brief of appellants why the mortgage should be sustained.

As in the case of the answer to the discussion of the proposition the appellee asserts for the dismissal of the appeal, viz., that an appeal will not lie from a part of a judgment, the appellants on this branch of the case go into a lengthy discussion of matters other than the proposition contended for. A long discussion is indulged in to establish the general proposition that a power to sell and convey includes a power to mortgage. The appellee certainly never undertook to dispute that proposition, and if any authority can be found in the statute authorizing the Helena Power and Light Company to sell and convey all of its property and franchises, it is conceded that the same provision would authorize it to execute a mortgage of its property. But there is none such. In the supplemental brief of appellee we called attention to a section of the statute which authorizes corporations created under the provisions of Chapter XXV "to hold, purchase and convey such real and per-

sonal estate as the purposes of the corporation may require'' (brief, page 7), and we showed by decisions of the Supreme Court of the United States that this statute did not authorize or permit the corporation to execute a mortgage upon is entire plant.

In the case of

Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S., 24-61,

the court said:

''Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or lease its *entire* property and franchise to another corporation.''

In Branch vs. Jessup, 106 U. S., 468,

the same idea was expressed in the following language:

''Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and it does not extend to the sale of the railroad itself or of the franchises connected therewith.''

Notwithstanding these decisions, conceded to be in point as they must necessarily be, the appellants in their brief call attention to this statute as a justification for the execution of the mortgage.

The brief also calls attention to Section 447, which provides, among other things, that corporations created under the provisions of Chapter XXV shall have the power ''of holding or conveying, by deed or otherwise, any real or personal estate whatever, which may be nec-

essary to enable the said company to carry on their operations named in the certificate."

Under the decisions of the Supreme Court of the United States above referred to, and the case of

Coe vs. Columbia R. R. Co., 10 Oh. St., 372,

and Jones on Corporate Bonds and Mortgages, referred to at pages 8 and 9 of the supplemental brief, this does not authorize a mortgage by the Helena Power and Light Company of its entire property.

And then the attention of the court is called to Section 1555 of the Compiled Statutes, which provides that:

"All mortgages or deeds of trust of both real and personal property within this territory, heretofore or hereafter executed by any incorporated company, shall be governed by the law relating to mortgages or deeds of trust of real property, and be recorded, etc., etc."

It is not contended that *no* corporation created under the provisions of Chapter XXV has any authority to execute a mortgage. We stated at page 4 of the supplemental brief "that an ordinary commercial corporation has the implied right to execute mortgages upon its property." If any such corporation shall execute a mortgage or deed of trust, it becomes subject to the provisions of Section 1555. Certainly there is nothing in this section which modifies in any way the rule of law to which we appealed, viz., that corporations with public duties to perform have no power, without express legislative permission, to execute a mortgage upon the property necessary to the discharge of their public duties.

Before proceeding farther, it may be desirable to call the attention of the court to the averments of the answer of the appellee, which are taken as confessed.

It is therein set forth that "at all times since on or about the first day of January, 1895, and down to the time of the filing of the complaint herein, the Helena Power and Light Company was engaged in operating lines of street railway in and over the streets of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas light to the city of Helena and the inhabitants thereof, the electric wiring being furnished by wires strung through the streets of the said city of Helena, and the gas through pipes and mains laid through the streets of the said city of Helena, and that the said defendant, Helena Power and Light Company, has so and for such purposes occupied the said streets and conducted the said business under *franchises* to it granted bythe said city of Helena under authority of acts of the legislature of the State of Montana, and under franchises granted by the general laws of the State of Montana."

Transcript, pages 47-48.

It is further averred "that all the property mentioned in the mortgage attached to the bill of complaint herein, was, at the time of the commencement of this action and at all times had been, held by it, so long as it held the same, under such franchise so as aforesaid to it granted."

Transcript, page 48.

The appellants appear to contend that nearly if not quite all the questions involved in this record have been determined in its favor by the case of

Knight vs. Helena Power & Light Co., 22 Mont., 391.

It might be well to consider for a moment just exactly what was decided in that case. The Helena Power and Light Company had constructed a line of street railway, known as the "Lenox Additional Line." After operating this line for some time it ceased to run cars on it presumably because it did not pay, and was about to tear up the track, and an action of mandamus was brought against it to compel it to operate the line. The court refused to grant the writ. It appears in the reply brief to be contended that because the Supreme Court of Montana would not issue a writ of mandamus to compel the Helena Power and Light Company to operate its "Lenox Additional Line," that the principles to which we appeal have no application.

In the case of

N. P. R. R. Co. vs. Terr. of Washington, 142 U. S., 442,

the Supreme Court of the United States reversed a judgment by the Territory of Washington issuing a writ of mandamus to compel the Northern Pacific Railroad Company to maintain a station at Yakima City. In the opinion by Mr. Justice Gray it appears that the Supreme Court of the United States held that mandamus could

not issue in that case for exactly the same reason that the Supreme Court held that it could not issue in the Lenox Additional Line case. In the latter casethe Supreme Court of Montana held that the ordinance of the city of Helena gave the Helena Power and Light Company the privilege to construct the line, but that the street railway company had not obligated itself to operate or maintain it. In the opinion in Northern Pacific vs. Territory of Washington, the Supreme Court of the United States says:

"If the charter of a railroad corporation simply authorizes the corporation, without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative."

It would be a rather startling proposition to assert, however, that in the case last above referred to the Supreme Court of the United States had overruled the case of

Thomas vs. R. R. Co., 101 U. S., 71,

or announced any principles whatever in conflict with the law of that case.

The reply brief of appellants upon this feature of the case contains a lengthy extract from the opinion in the case of

Hunt vs. Memphis, 31 S. W., 1007,

in which it was held that the principle that corporations of this character have no power to execute mortgages upon their property without express legislative authority was held inapplicable to the case of a gas-light company.

What was really decided in that case, was not that the general principle asserted was not sound, but simply that it did not extend so far as to embrace gas light companies. Of the soundness of the principle as it applies to street railway companies, no court has yet ever ventured to express a doubt.

In the very latest work on corporations, an admirably prepared treatise, occurs the following:

"This principle applies to all corporations which are given the power of eminent domain *or other special privileges,* and which in return therefor, are under a special duty to serve the public—as ordinary railroad companies, *street railroad companies,* sleeping-car companies, canal companies, water companies, *gas and electric light companies,* cemetery companies and the like."

1 Clark and Marshall, 441-442.

In support of the text as to street railway companies the author cites:

Richardson vs. Sibley, 87 Am. Dec., 700;

Middlesex vs. Boston, 115 Mass., 347;

Abbott vs. Johnston, 80 N. Y., 27;

Doane vs. Chicago, 51 Ill. App., 353;

and as to gas companies,

Visalia vs. Sims, 104 Cal., 326;

Brunswick Gas Co. vs. United Gas Co., 85 Me., 532;

Chicago Gas Co. vs. People's Gas Co., 121 Ill., 530;

Gibbs vs. Con. Gas Co., 130 U. S. 396;

Bath Gas Co. vs. Claffy, 74 Hun, 638,

and then adds,

"But see Commonwealth vs. Lowell, 12 Allen, 75;
Evans vs. Boston Heating Co., 157 Mass., 37; and
City of Detroit vs. Mutual Gas Co., 43 Mich., 594."

They then, however, lay down the qualification as follows:

"But it does not apply to purely private corporations which are not vested with power of eminent domain, or *other special privileges,* and which owe no special duties to the public, although their business may be in a sense public. Thus it does not apply to a gas light company which is not given the power of eminent domain or other special or exclusive privileges," (and here Hunt vs. Memphis is cited.)

An examination of the case of Evans vs. Boston Heating Co., 157 Mass., 37, will show that it did not appear in that case that the company was granted any privileges whatever by the public. The appellants venture to assert that this case overrules Richardson vs. Sibley, but this contention cannot be sustained. The last mentioned case was expressly affirmed in Middlesex vs. Boston, above cited. The authors above quoted continue:

"The principle also applies to a mortgage of its property by such a corporation, for, as was said by Judge Hoar in a Massachusetts case, 'the power to mortgage can only be co-extensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure.'
Commonwealth vs. Smith, 10 Allen, 448-455."

The general principle is expressed by the authors in the following language:

"It is clear that a corporation cannot, without express authority from the legislature, transfer or mortgage its franchise to be a corporation, for this would result in the creation of a corporation without the consent of the legislature. Nor, according to the better opinion and the weight of authority, both in England and in this country, can a *quasi* public corporation transfer the franchise to be a corporation, conferred upon it by its charter, as the franchise or privilege of constructing and maintaining a railroad, a canal, or water or gas works, or a turn-pike or plank road, or a bank, etc., unless such transfer is expressly authorized by the legislature or ratified by it. This principle not only applies to an absolute conveyance, but it also applies to a lease, or *mortgage.*"

1 Clark and Marshall, 444-445.

In Booth on Street Railways, 423, the same doctrine is declared in the following language:

"The reasons which support the policy of the law forbidding the sale by a railroad corporation of its franchises, and property acquired by eminent domain, without legislative authority, apply in the case of mortgages given by the corporation," and in support of the text, the author cites Richardson vs. Sibley, and Commonwealth vs. Smith.

The case of

Brunswick Gas Light Co. vs. United Gas Co.,
85 Me., 532,

is apparently directly opposed to the authority of Hunt vs. Memphis, but the conflict is probably more apparent

than real. In the Maine case it either appeared or was assumed that the company enjoyed some privileges granted by the municipality.

The right to operate a street railway over the streets of a city is a special privilege. It was decided in

Fanning vs. Osborn, 102 N. Y., 442,

that the right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and that the construction and maintenance of a street railway by any individual or association of individuals without legislative authority constitutes a public nuisance, and subjects those maintaining it not only to indictment, but to a private action in favor of any person sustaining special injury therefrom.

The Supreme Court of the United States had something to say as to the nature of gas companies, and the powers exercised by them in

Gibbs vs. Con. Gas Co., 130 U. S., 396.

In that case, Mr. Chief Justice Fuller, announcing the opinion of the court, said:

"These gas companies entered the streets of Baltimore under their charters in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to *fulfil the public purposes, to subserve which they were incorporated.*"

And the following is found in the syllabus in

New Orleans Gas Light Co. vs. Louisiana Light Co., 115 U. S., 650,

viz.:

"3. The manufacture and distribution of gas by means of pipes, mains, and conduits, placed, under legislative authority, in the public ways of a municipality, is not an ordinary business, in which everyone may engage, as of common right, upon terms of equality; but is a franchise relating to matters of which the public may assume control, and, when not forbidden by the organic law of the state, may be granted by the legislature, as a means of accomplishing public objects, to whomsoever, and upon what terms, it pleases."

In the body of the opinion the court quotes with approval the following language from

Crescent City Gas Light Co. vs. N. O. Gas Light Co., 27 La. Ann., 147:

"The right to operate gas works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and, in the exercise of the police power, the state could carry on the business itself or select one or several agents to do so."

Thus gas and electric light companies and street railway companies must likewise be held to have assumed to discharge public duties. The Circuit Court of Illinois said, in

Chicago Gas Co. vs. People's Gas Co., 121 Ills., 530:

"The manufacture and distribution of illuminating gas by means of pipes or conduits placed by legislative authority in the streets of a town or city, is a business of a public character. It is the exercise of a franchise belonging to the state. The services rendered and to be rendered for such grant are of a public nature. Such right is conferred by public grant as well for the benefit of the public as of the corporation taking the same."

By the language of the authorities cited, it will be observed that it is not necessary that the corporation should have the right of eminent domain in order that the principle to which we appeal should be operative as against it, provided that it obtains special privileges from the public, and is enabled to carry on its business only because of its having such special privileges. These special privileges to occupy the public streets, the Supreme Court of the United States speaks of in the Gibbs case as the equivalent of the right of eminent domain, but under the statutes of the State of Montana the right of eminent domain may be exercised in favor of corporations undertaking to supply "heat or gas for the use of the inhabitants of any county, city or town, or "railroads" and "telephone or electric light lines." Section 2211, Code of Civil Procedure.

It is not material either whether the right to occupy the public streets is denominated a "franchise" or a mere privilege, but that it is aptly designated as a "franchise" is not open to doubt.

In addition to the authorities heretofore referred to, we call the attention of the court to the following:

"The word 'franchises' is frequently used to designate those special privileges and powers conferred upon a corporation for the furtherance of some public work, such as the rights of eminent domain and those rights or privileges which are essential to the operating of the corporation and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like."

I Elliott on Railroads, 67.

Even in the case of

State ex rel. Knight vs. Helena Power and Light Co., 22 Mont., 391,

the following may be found:

"The *franchise* in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance, which is quoted above, merely grants 'the privilege' of constructing and maintaining street railways over the lines therein designated."

The brief of the appellants undertakes to establish that the rule to which we appeal applies only to commercial railroads, but we have shown by abundant authority that it is not so restricted. A similar statement is found in the opinion in the case of Hunt vs. Memphis Gas Co., and it is there stated that this contention is supported by Beach on Private Corporations, Jones on Mortgages, and Morawetz on Corporations.

Appellants' Reply Brief, page 21.

A reference to the authorities mentioned will show that in using the expression "railroad corporations" they made no distinction whatever between street railways and what are called "commercial railroads," in proof of which the case of Richardson vs. Sibley is cited in each case. The language of the court is not at all sustained by the authority of Jones on Mortgages. At the section referred to, the views of that author are expressed as follows:

"Corporations to which are given large powers and valuable privileges, from the exercise of which it is ex-

pected the public will derive advantage, are impliedly restrained in their power of alienation. Railroads are of this class. They cannot mortgage their franchise or property essential to the continued operation of the road without legislative authority."

That this corporation had no power to execute the mortgage which is made the basis of this suit, we believe to be thoroughly established by the decisions of the Supreme Court of the United States, which are in accord on this question with the holdings of the courts generally, and, of course, if the complainant never had a valid mortgage it ought not to have its claims satisfied out of the property of the mortgagor company in preference to the appellee under his judgment.

But here also the appellants claim that some dangerous admissions have been made by the appellee. We never before heard it asserted that a proposition of law was admitted by anything in a pleading. We understand the elementary rule of pleading to be that the facts well pleaded may be admitted, either expressly or by failure to deny, but we understood it to be equally well established that conclusions of law are never admitted.

We have no right to complain of this judgment any further than our interests are affected by it. We have no reasons to urge why the property of the Helena Power and Light Company should not be sold so long as our judgment is satisfied out of the avails. It is useless to contend that because we say in the answer that we are willing the property should be sold, we thereby admit that the complainant has a valid mortgage upon the

property. The validity of its mortgage depends upon the facts. The fact is that the complainant was organized under the provisions of Chapter XXV of the Compiled Statutes; that it was engaged in carrying on a public business; that with its property it occupied the streets of the city of Helena, under ordinances of that city, and that it could conduct its business only by so occupying the streets; that it was engaged with its property in the performance of public duties, and because, and only because it was so engaged could it obtain the right to occupy the streets. From these facts we insist that it is the law that the complainant had no valid mortgage and no admission made in the pleadings can affect this proposition.

We most respectfully submit that the court, in the discharge of its duties, ought to consider and dispose of these questions involved in this record and render its decision as they shall be found to affect the decree. They are both questions of very grave moment, the one to the profession, and the other to the business community. We most respectfully request that the appellee be given an opportunity, by oral argument, to present these questions more fully for the consideration of the court, should it deem it necessary. We have no fault to find with the opinion of the court upon the questions canvassed in it, but we respectfully submit that, notwithstanding the conclusions there urged, this decree ought not to be reversed.

Respectfully Submitted.

T. J. WALSH,

Counsel for Appellee.

No. 864

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE BOISE CITY ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

Plaintiff in Error,

vs.

BOISE CITY, IDAHO,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

The Filmer Brothers Co. Print, 424 Sansome St., S. F.

INDEX.

In the Circuit Court of the United States, Central Division, for the District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,

Plaintiff,

vs.

BOISE CITY.

Defendant.

Complaint.

Plaintiff, a corporation of the State of West Virginia, brings this action against Boise City, a municipal corporation of the State of Idaho, and, complaining, alleges:

I.

That now and at all times since September 1st, 1900, plaintiff is and has been a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, and acting as such, and as such is doing business in the State of Idaho, with its principal office and place of business in the city of Boise City, Ada County, Idaho, and has complied with the laws of Idaho obligatory on foreign corporations doing business in Idaho.

II.

That defendant is and during all times herein mentioned has been a municipal corporation, a city of Idaho, situate in said Ada County.

III.

That the amount involved in this controversy and to recover which this action is brought exceeds the sum of five thousand dollars, exclusive of interest and costs.

IV.

That during all times herein mentioned, since March 28th, 1891, and prior to August 28th, 1901, there existed that certain private corporation, acting and doing business as such, and so known and recognized, named, known as, and called the Artesian Hot and Cold Water Company, Limited, and which will also be hereinafter often referred to and called (for convenience) "the Idaho Company," and which was organized and existed under and by virtue of the general laws of Idaho relating to private corporations, and had its principal office and place of business at said Boise City, and which was the predecessor in interest in the waterworks, rights and properties hereinafter mentioned, and in the ownership and operation of the same.

V.

That during all the times herein mentioned, subsequent to March 28th, 1891, and down to the 28th day of August, 1901, said Idaho Company was the owner of waterworks and waters of great value, such waters having been discovered, located, developed and supplied by said company and its predecessors in interest at great trouble, labor and expense and by sinking shafts, running tunnels, digging and boring wells into the mountain land owned by said company and its said predecessors; none of its waters having been acquired, claimed out of, or appropriated from any pond, lake, stream or natural

source or natural supply, or from any of the public waters of the said State; that its business was, among other things, the operation of a cold and of a hot water plant in Ada County, Idaho, in, and in the vicinity of, the city of Boise City. It owned and operated with and on its own properties its own waters only, all situate upon its own lands except certain underground pipes and their connections which ran through other lands over which it had easement, right of way and franchise. Its waters were expensive having been developed, supplied and maintained at great cost. The founders, creators, original owners and first operators of the said water plant and waterworks, the predecessors in interest in same of said Idaho Company, were H. B. Eastman and B. M. Eastman. Said Eastmans, as soon as they had discovered, developed and collected of said waters quantities nearly sufficient to supply water for domestic use to the inhabitants of said city and its vicinity, applied for and obtained by grant on the third day of October, 1889, a franchise from said defendant city in words and figures as follows, to wit:

"AN ORDINANCE GRANTING EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, Idaho, Ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through and along and across the streets and alleys

of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

VI.

That the said Eastmans promptly accepted said grant and franchise and immediately thereafter continued to lay water pipes in the streets of said city and to extend the same from time to time as they increased their said water supply and as the demand therefor by the citizens of said city increased, and to charge, collect and receive reasonable water rates from all persons who demanded and received water from them, the said Eastmans; and they at all times did and performed all things obligatory upon them under and by reason of said franchise, or of their acceptance of the same, or of the operation of said waterworks, or which were obligatory on account of any matter or thing connected with the operation of said waterworks, or the acceptance of said franchise.

VII.

That in June, 1890, the said Eastmans and others formed a corporate company known as the Boise Waterworks Company, a corporation formed and organized under the general laws of Idaho as a private corporation, which afterwards became and was the successor

in interest of the said Eastmans in and to their said waterworks; and in said grant and franchise from said city, and it assumed as such successor all the duties and liabilities, and none other, appertaining to said waterworks, and to said franchise in the hands of said Eastmans, and was by all persons recognized as such successor with such duties and liabilities.

VIII.

That afterwards and on the 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited (herein also designated as the "Idaho Company"), was formed and organized, and it became and was the successor of the said Boise Waterworks Company and of the said Eastmans in and to said waterworks and the said grant and franchise made to said Eastmans by said city, and was so known and recognized by all persons, and acted as such down to August 28th, 1901. and it also in like manner, and with like limitation, assumed all the duties and liabilities pertaining to said waterworks and said grant and franchise which were assumed by or were obligatory upon the said Eastmans, and it owned all said properties, rights, franchises and privileges and operated the same as such successor down to August 28th, 1901, and during all these times did and performed all it was obligated to do by virtue of such operation, ownership and successorship.

IX.

That the said Eastmans and others prospected by deep boring into the rocks of the mountains upon their own lands for both hot and cold waters and discovered the same at an average depth of about 400 feet, and sold

the same with the lands upon which they were situate to said Idaho Company, and said Idaho Company employed and used the same in supplying both hot and cold artesian waters to the citizens of Ada County both in and in the vicinity of said city for reasonable compensation. Said waters were used for various beneficial purposes, including use for baths and bath-houses, public and private, for mechanical, sanitary, hospital and domestic purposes, and to secure such waters said Idaho Company and its predecessors have bored nineteen such wells, aforesaid, have run tunnels into the mountains, and thus, at great expense, discovered and developed on their own lands all of the waters used in said waterworks, have constructed and maintained both hot and cold water systems; that the supply of hot water is very limited (and for more than a year last past has been all applied for and rented to patrons), and, after great and expensive efforts to obtain more, seems incapable of being increased; that the supply of cold water for said system is limited and can only be increased by extra efforts and expense including the necessity of expensive pumping when more is required than is needed for the domestic and ordinary use of the usual paying patrons of said waterworks; that the waters of said waterworks are expensive, costing great outlay of money to develop and maintain the same, and greater labor and expense each day to increase the amount of cold water whenever the same is used for street sprinkling, and every gallon of water used for street sprinkling is that much beyond the means and supply of said waterworks and entails the extra cost, expense and labor of producing that amount by pumping, raising it to the height or

pressure of 178 feet above said city; that for supplying water equal to the demand of patrons for domestic use, and for all ordinary uses other than sprinkling of streets, except in case of fire, requires only a small pumping plant, and that to be used only about four hours each day; that to supply sufficient water for such use of its said patrons, when said city is taking waters as hereinafter set forth, requires much extra labor and expense and necessitates a larger pumping plant, the digging of extra wells, and almost constant pumping, and is beyond the water supply, the resources of the plant and the means of the owners and operators of said waterworks.

X.

That the said Idaho Company, from the said date of its formation down to August 28, 1901, was a private corporation, organized and existing under and by virtue of the general law and statute of Idaho as such, and so known, recognized, and dealt with by all persons at all times, and had its principal place of business at said Boise City; that it was, and was recognized as, the successor in interest of said Boise Waterworks Company and of said Eastmans, and so dealt, was dealt with, and acted during all said times down to August 28th, 1901, in and to the said waterworks and the rights, franchises and privileges, and in all that pertained to the said waterworks, and that also belonged to said Eastmans as owners of, as grantors of, and as operators of, the same under said rights and privileges in hands of said Eastmans, and as nothing different, farther, or otherwise; and said Idaho Company, during all said times, assumed and performed all the like duties obligatory upon said Eastmans when and as such owners and opera-

tors, and all that would have been obligatory upon said Eastmans during any of said times had they continued to own and operate said waterworks and properties at all times or ever; and during all said times it was by defendant and all persons so known, recognized, dealt with and acknowledged as such successor, owner and operator aforesaid, and not otherwise.

XI.

That the ordinary and necessary demand for water from said waterworks required, at no time during last five years, any pumping except by one pump, and for the space of not to exceed over four hours each day, and for most of that time no pumping was required at all for ordinary uses, while to supply the water for such ordinary and necessary use, during these times, of the customers of said company, and at the same time to furnish waters used for street sprinkling by the defendant as hereinafter set forth, did at all times during the sprinkling seasons for the years 1900 and 1901, require the whole capacity of a large pumping plant of two large pumps run nearly every hour, by day and by night, and this pumping, and such extra pumping said Idaho Company was compelled to do by the wrongful acts of defendant, hereinafter set forth, and did so do during such said seasons.

XII.

That said Idaho Company had continually, since its formation, dealings with said Boise City, with Ada County, and with the State of Idaho, and as such corporation and as such successor of said Eastmans in interest in said waterworks, franchise, privileges and

rights; that at nearly all times since its existence furnished water to said city and inhabitants thereof, for fire purposes, for sprinkling of its streets, for heating of buildings and for other useful purposes, for reasonable compensation and at agreed rates as to all uses until the sprinkling season of 1900, when defendant refused to enter into any contract for water for fire purposes or for street sprinkling purposes, or for any other purposes which it denominated "great necessities"; that prior to 1897 what water taken from said waterworks was used in said city for street sprinkling, was obtained from said company directly by the owners or lessees of abutting property on streets sprinkled, and by contract at reasonable agreed rates; that in 1897 the said city assumed to and did instead and in place of said abutting owners or lessees, and on its own account, contract for and with said company, and obtain from said company, water for street sprinkling purposes, for which water it agreed to pay and did pay a reasonable agreed price; that thereupon, in order to facilitate the taking and use of its waters for street sprinkling purposes, said Idaho Company, by and to carry out its contracts with said city, and under promises of patronage from said city, erected and maintained at its own expense stand-pipes in all parts of said city, whereby contracts and by requests of said city, it was obligated or directed so to do, and did this for such purposes only, and under and on account of said contract for such supplying of its waters when and where requested by said city, the city by contracts agreeing to purchase waters of the company for such purpose; and said Idaho Company, by request of said city, and for its convenience in taking its waters for

such sprinkling purposes, did thereupon so erect eighteen in number of such stand-pipes at a cost of over three hundred dollars, and maintained the same as by said agreement it was obligated to do; and in order to have sufficient supply of water for its other uses and the uses of its customers, together with what under contract with defendant would be used for street sprinkling, and in accordance with the terms and conditions of said contract, and to carry out the same on its part, the said company did, as it had in said contract with defendant agreed to do, within ninety days from and after the execution of said contract, lay a ten-inch main pipe from its pumping station to said city, and that except for supplying said city with water, as by said contract was contemplated and provided for, the six-inch main which then extended from said waterworks, reservoirs and plant to said city was sufficient and adequate for all purposes and uses of said company and its patrons.

XIII.

For the year 1898, a like contract was made and entered into between said city and said Idaho Company, whereby said company was to erect and maintain at its own expense, stand-pipes for the convenient taking and use of its said waters when and where requested so to do by said city, and the said city was to have of its said waters water for street sprinkling purposes at certain agreed rates per front foot of properties abutting on streets sprinkled, the same being in proportion to amounts of water taken and used on various streets respectively, the said city to pay for same at such rates, which it did accordingly; and the said company did all

it was required to do, or was obligated to do, under said contract, or otherwise; that for the year 1899 the said Idaho Company and the said city made and entered into a like contract for water for street sprinkling to those theretofore made as aforesaid, and each party thereto carried out what it was required to do under said contract, except that the said city has not as yet fully paid the moneys due the company thereunder. In each and all of said contracts the said parties thereto distinguished between the taking and using of waters for street intersections and alley crossings and those used on portions of streets before lots abutting thereon, and in which later case the cost thereof was assessed with other costs of sprinkling same to owners of such lots, and was by the city collected from such owners, and paid over to the said company.

XIV.

That during the existence of said Idaho Company prior to 1900 it had, as such water company, and as such successor in the interest, ownership and operation of said waterworks, rights and properties and all belonging or appertaining thereto, at all times and continually dealing with said city and as such water company, with such rights, privileges, and properties, entered into contracts of various kinds with said city concerning the use of its waters and the supplying the same, including contracts for furnishing water for fire purposes and for street sprinkling purposes, and all these contracts were, prior to 1900, faithfully carried out by both parties thereto, and the performance and execution were in every way acceptable to and approved by said city, and were

reasonable, fair and legal; and in preparing to carry out what was agreed to in, and contemplated by, said contracts, for water for fire and street sprinkling purposes, it, as was then and there well understood, agreed and promised by and between the said parties thereto, became and was necessary, and the said company was obliged to, obligated to, and did go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand-pipes, in the increasing of its pumping plant, in the purchasing of a steam boiler, engine and pump, and in various other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said waterworks for all other purposes than street sprinkling, and such said extra expense was incurred in pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such continuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street sprinkling was conceded, acquiesced in, and respected by the defendant and by all persons; and defendant contracted thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collecting the same both by legal proceedings in the courts and otherwise.

XV.

That the said Idaho Company at great expense improved said system of waterworks and largely increased

its water supply; it invested in said waterworks system and property used in connection therewith, a sum equal to three hundred and forty thousand dollars ($340.000), a large portion of which was made necessary to enable said company to furnish the said city with water for municipal purposes, particularly for sprinkling the streets, and extinguishment of fires, and said company was, especially during the last two years, put to great additional expense in the daily operation of its said waterworks system on account of the great quantities of water taken and used by said city for street sprinkling; such additional expense was in about the sum of $900.00 per month over and above what would have been otherwise required.

XVI.

That the said Idaho Company had a several and separate contract with said city for each of the years 1896, 1897, 1898, and 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the city agreed to pay to the said water company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city.

XVII.

That in or about the month of March, 1900, the said city having declined to pay or agree to pay the said water company anything for the use of water for municipal purposes, did, without the request or knowledge of the said water company, undertake and assume to

pass an ordinance purporting to grant to the said water company the right to lay pipes in the streets and alleys in said city, and to collect charges for water supplied to the inhabitants thereof, but requiring the water company to furnish water for city purposes free of charge; the said water company not only never requested the passage of this ordinance, but has never assented thereto, or accepted it, or ever recognized in any manner the validity or binding effect thereof; and thereupon, after the passage of said ordinance, the said city at once proceeded to, against the orders of said company, without its consent, and by force, take water of the said Idaho Company, from its waterpipes, and to use it for street sprinkling, and to sprinkle about thirty miles of streets with said company's water, taken without permission, against the protests of said company, and by force, from said company's pipes, and to do the same under claim of right to free water; and under and by virtue of said ordinance the police of said city protected and enforced the taking of said waters aforesaid, and the meddling with the waters, the pipes, and the property of said com pany; and the said city continued so to take water continually, and continually against the protests and objections of said company, from and after the passage of said ordinance in March, 1900, down to August 28th, 1901, and to use the same for sprinkling its streets, and by force, and declaring it would pay nothing therefor, and on the ground that said company was not entitled to any compensation therefor; and said city assumed the control and direction of the sprinkling in front of all properties of all owners, and prevented owners of abutting property from contracting for or paying for the

water used in sprinkling in front of their respective properties, and, by its police and police power, said city enforced said ordinance demanding said waters free for street sprinkling, and as aforesaid, by force, took the same, proclaiming that it would give no compensation therefor.

XVIII.

That for sprinkling streets at all times since March, 1900, and prior to August 28th, 1901, the said city took each day from the said waterworks system of said Idaho Company water to the amount of over two hundred and fifty thousand gallons; and to furnish said water into its pipe lines, whence it was so taken, cost the said Idaho Company over fifty-five dollars each day of such taking, and thirty-nine dollars per day over and above what the company's daily expense would otherwise have been, and that said water was reasonably worth then and there twelve and one-half cents per thousand gallons, and was worth that much to the said city, and the taking of the same in manner aforesaid, by force and without consent, did the said Idaho Company a damage of over fifty-five dollars each day during all of such times between such dates on days when water was so taken for such sprinkling of streets, and the days between such dates when water was so taken were in number greater than four hundred.

XIX.

That said city is situate immediately upon a large, ever-flowing river, is traversed by three large, ever-flowing water ditches, each and all containing an abundance of water, and is built upon lands but little above the water line, so that shallow wells from eight to fifteen

feet deep, sunk anywhere in said city, furnish an abundant supply of water, and that all these waters were and are in abundance in, around, and under said city, and furnish and furnished to all parts of said city a cheap, convenient, and inexhaustible supply of water, costing little or nothing except the effort of dipping it up, or in some way raising it a few feet. Such cheap water was and is as good as any for street sprinkling, but not so cold, pure, healthful, and desirable for drinking, bathing, and culinary purposes as are and were the expensive waters of said waterworks then owned and operated by said Idaho Company; that instead of using such cheap waters, the said city at all times since March, 1900, has taken the position, has given notice and declared that the waters taken and used by it for street sprinkling on any and all of its streets, or any portion of any street, need not be paid for, either by it or by the owners of abutting properties, or by anyone or at all, provided that the same be taken from said waterworks.

XX.

That said Idaho Company never enjoyed any special or exclusive rights, privileges or franchise of any kind; that at all times any person, partnership, association or corporation might have laid pipes in the streets and alleys of said city and sold water to said city and the inhabitants thereof, and in all respects do and enjoy all that said Idaho Company did or could have done; and that at all said times, and now, one person, Mr. Peter Sonna, had and has a system of waterworks which supplied and supplies a considerable portion of said city, and the inhabitants thereof with water, for compensa-

tion at rates fixed by contracts between Mr. Sonna and his water customers, said consumers of water from his waterworks, he, during these times supplying water for domestic uses, lawn sprinkling and mechanical purposes, all within said city, and where said Idaho Company had mains and waterpipes, and where it could as easily have furnished water as it did in any other portion of the said city, and said Mr. Sonna did not furnish free water to said city for street sprinkling or fire, or for any purpose, or at all, and said city did not require or demand free water from his system of waterworks, nor did it take the same; and during all these times since 1899, said Sonna thus furnished water for such compensation to eight blocks of said city, and to the inhabitants thereof, and might have and had the right to have furnished any number of the blocks of and the inhabitants of said city with water, all under the same kind of powers and privileges, and like grant and franchise, as was granted and accepted by said Eastmans and said Idaho Company; and said Sonna had and has the same pure, cold mountain water with which he did and can supply his customers from said waterworks system as had said Idaho Company and its said predecessors: And that others enjoy, and during said last four years have enjoyed, like grants, rights and privileges from said city, and have customers of said city and of its inhabitants in the purchase and use of water, and each and all said parties were and are competitors with the owners of said system of waterworks, then owned by said Idaho Company, in said business of furnishing water to said city and its inhabitants; and that from none of said such competitors was free water demanded or taken by said city on the ground tak-

en by said city that a firm, a natural person, or an association of persons need not furnish water free of charge, for street sprinkling, or for any purpose, while it or they enjoy all the rights and privileges ever enjoyed by said Idaho Company or its predecessors, while said city did require free water from said Idaho Company and, during all times since March, 1900, did by force take water, as aforesaid, proclaiming that no compensation need be or would be given for same, and that it was because said Idaho Company was a corporation. And that the date of the ordinance of said city granting to said Mr. Peter Sonna said franchise was May 25th, 1894; and that at all times since that date said Sonna has had such rights and privileges, and had same renewed and confirmed by two subsequent ordinances of said city; and that in 1892, one A. D. Foot, was by said city granted similar rights of laying waterpipes and operating a water system in said city, and said city passed an ordinance and resolution in 1892, granting to any and all persons same and like rights and privileges of pipe laying and waterworks in said city; and that in 1900 said city by ordinance granted to one Charles Fifer the like right to lay pipes and operate waterworks in said city for purpose of furnishing said city and the inhabitants thereof water for compensation, and to enjoy all the rights and privileges enjoyed by said Idaho Company or by any of its predecessors or successors, and from none of said parties, and from no other party or person has free water for street sprinkling been by said city demanded, required or taken.

XXI.

That there were in said city a large number of standpipes, which were the exclusive property of the said Idaho Company, and which the said company erected and connected with its mains for the purpose of selling water for street sprinkling, and for years were, under contracts with the said city, so used. Said stand-pipes were erected by the said company under contract with and by request of said city, and in same contract, said city for each of the three successive years, and down to 1900, agreed to pay for the water used for sprinkling the streets for that year, and for such purposes and objects did said Idaho Company erect and maintain said standpipes, some of which were connected with its hot water pipes, and the rest with its cold water pipes; and under contracts to furnish extra water, extra reservoir and extra pressure for use of water for fire purposes by said city, said Idaho Company had, prior to 1900, connected its water mains with sixty large fire hydrants in said city, and did the same under contracts for, and in expectation of, being paid for use of its waters for fire purposes and was so paid by said city at all times down to March, 1900, when said ordinance for free water was passed; that immediately after the passage of said ordinance, the defendant, by its officers, agents, and servants, forcibly took possession of and used said standpipes and took said company's waters from and through same, and sprinkled same upon its streets; and said city attached standpipes to many of said fire hydrants, and from and through them also took said waters and used same for sprinkling on its streets, and all this it did and continued to do, wrongfully, illegally and by force, from

and after the passage of said ordinance down to August 28th, 1901, to the damage and injury of said Idaho Company in the sum of over $11,000.00; and that of the waters, so taken from said company by said city during said time, and of the damages so sustained by said Idaho Company on account of such said taking, a large portion and part, to wit, one-fourth of the same, was on account of sprinkling for and in blocks and parts of said city which were supplied by water from the waterworks of said Peter Sonna, and where the inhabitants did not obtain water from said Idaho Company.

XXII.

That there was no great necessity or any necessity upon said city for taking said Idaho Company's water during said times for street sprinkling, and in so wrongfully taking it the said city elected to use and consume the expensive waters belonging to said company rather than to rightly take the cheap water running around, through and under said city in abundance.

XXIII.

That said city during said years of 1900 and 1901 down to August 28th, 1901, not only thus wrongfully took said Idaho Company's waters from said stand-pipes and said fire hydrants within said city, but also took from said company's stand-pipe and waterworks without said city, and drew the same within said city and used the same to sprinkle its said streets.

XXIV.

That in no way could said Idaho Company prevent or stop defendant from thus taking its said waters without

shutting off all and every supply of water from its customers within and without said city, interfering with and absolutely preventing its own use of said waters, and endangering all the property of said city, and other properties, by fire, and also endangering the lives and health of the inhabitants of said city and its vicinity.

XXV.

That it is not and never has been the usage, custom, habit, condition, state or public policy of the State of Idaho, or any portion thereof, must, did, or were obligated or expected to, furnish water for any purpose to any other person, city or town without compensation; and that this has never been done by any person or for any person or city, under claim of right in Idaho, and in no manner except as a gift entirely voluntary on the part of the donor; that said Idaho Company was unable to go to the cost, expense and labor of furnishing free water to said city, or to furnish free of charge the waters required by said city, taken during such times aforesaid, for street sprinkling purposes; and that such demand was beyond its means as such water company or otherwise; that said waterworks and business were, at all times since their first existence, most economically managed and operated; that said Idaho Company never had any salaried officer except its secretary, that no officer or member of the said company ever had its waters at any cheaper rates than the other customers of the company, that for years its president has devoted much time and valuable personal services to the necessary business of the company, and, since its existence, the manager of said company has every year devoted

very much of his time and labor to its management, and some years time and labor were thus taken up, yet neither the president or the manager of the said company have ever had any salary or other remuneration for services rendered the company, and notwithstanding such and in every way the most economical management the said Idaho Company's stockholders received only fifteen per cent in dividends on their investments during and for all the years of its existence; that the cold water system of said waterworks has been, and must be, under the circumstances, run not only without profit, but at a loss to its owners and operators whenever water is taken from it for such street sprinkling purposes without remuneration.

XXVI.

That the waters thus taken by said city for sprinkling of streets was so taken daily at all times when sprinkling was desired, from March 1st, 1900, down to August 28, 1901, and for not less than four hundred days between said dates, and that it was unnecessarily taken, wrongfully taken, and in so taking them the defendant elected to use and consume expensive waters belonging to said company, rather than the cheap waters running around, through and under said city as aforesaid, and that said defendant has not paid or caused to be paid anything therefor, and proclaims that it never will give any compensation therefor.

XXVII.

That in the year 1900 said city so took of and from said Idaho Company's waterworks water for such street sprinkling to the amount of 49,370,000 gallons of which

9,874,000 gallons were hot water out of its said hot water system, and 39,496,000 were cold water out of its said cold water system; and that said water was then and there of the value and worth of twelve and one-half cents per one thousand gallons, and the value and worth of said hot water, so taken by said city from said Idaho Company's said hot water system, in the year 1900, was then and there of the worth and value of $1,234.27; and that the worth and value of the cold water, so taken in 1900 by said city from said Idaho Company's cold water system, was then and there of the worth and value of $4,936.98. That during the sprinkling season of 1901 and down to August 28th, 1901, said city continued to take said water as aforesaid from said Idaho Company's waterworks, and the water so taken by defendant amounted to 33,120,000 gallons of the value and worth of twelve and one-half cents per one thousand gallons, and that of said water, so taken in 1901, 6,624,000 gallons were hot water out of the said company's hot water system, and 26,496,000 gallons were cold water, so taken out of said company's said cold water system. That said hot water taken in 1901 was of the value and worth of $828.00 and that the said cold water, taken in 1901 as aforesaid, was then and there of the value and worth of $3,312.00, all of which the said city was then and there informed of and well knew; and that by the so taking said waters said company was then thereby damaged in a sum or amount of money greater than the said values of waters so taken during said years and damaged in the sum of $10,500.00, no part of which has ever been paid or satisfied, nor has

any compensation been had therefore or on account thereof.

XXVIII.

That the water so taken by said city during the years 1900 and 1901 from said Idaho Company's waterworks was in part taken for and used for the benefit of said city in sprinkling the intersections of its streets and alley crossings, but most largely for the benefit of such certain persons as were owners of lots abutting on streets sprinkled and for the purpose and effect of saving such said owners a portion of the cost and expense of such sprinkling, and had the effect of taking the water and property of said Idaho Company and giving it to other persons free of charge; and that the amount so taken for benefit of such said owners of abutting property was of great value, to wit, of the value of $7,500.00 and to the damage of the said Idaho Company to the amount of $7,500.00. That in the tampering and meddling with said company's pipes and the said fire hydrants as aforesaid, and in the taking of waters as aforesaid, for street sprinkling during the years 1900 and 1901 by the said city, the same was done so unskillfully and negligently and improperly as to at times cause great waste of water and unnecessary waste of water, so that large quantities were allowed to run and did run to no benefit of anyone, but to the injury of the streets, and to the great damage of said Idaho Company, to wit, to its damage in the sum of $187.50 and to the loss and waste of its waters to a large amount, to wit, to the amount of 1,500,000 gallons, of the value of $187.50.

XXIX.

That in addition to said waters so taken, as aforesaid, by said city from said Idaho Company's waterworks the said city during the said sprinkling seasons of 1900 and 1901, in the same manner, took from said Idaho Company and from its said system of hot water pipes outside the limits of said city water to the amount of 1,000,000 gallons of the value and worth of $125.00, for which water so taken, as aforesaid, said Idaho Company never received any pay or any compensation whatever, and for each and all of which defendant has continually since March, 1900, refused to pay and has proclaimed and given notice that it will take and never pay for same.

XXX.

That on, to wit, the 28th day of August, 1901, said Idaho Company decided, resolved and determined to go out of business and out of existence and to make plaintiff its successor in its said business and to all its rights, properties, privileges, franchise, claims, contracts, demands and pursuant thereto did turn over and transfer, assign and convey to plaintiff all its properties, business, claims, demands, accounts, rights, privileges, franchise, waterworks and all pertaining thereto, and all claims, rights, contracts connected therewith, and all moneys, damages and claims due or owing to it, arising either from contract, or from torts or trespasses, or from noncontract sources, including its said claim and all and every claim against said defendant, or any other person or persons, and said plaintiff did then accept the same and enter into the same and go on, in and with said business, and did

assume and agree to pay all claims of every nature and description of said Idaho Company, did enter into and carry on and out all its business and contracts and duties and obligations with or to other persons, and in every way, manner and respect became its successor. And ever since said 28th day of August, 1901, plaintiff has been and is in every respect and for every purpose the successor of said Idaho Company and is so known, and recognized by defendant and by all persons, and as such successor deals and has dealt with defendant and all other persons, and by all has been and is so accepted, known, recognized and acknowledged. And in accordance with said decision and determination of said Idaho Company to so make plaintiff its successor and to cease to exist, said Idaho Company caused such proceedings to be had in an action brought by it in the District Court of the Third Judicial District of the State of Idaho, County of Ada; that the judgment and decree of said court has been made and entered therein dissolving said Idaho Company, and said Idaho Company does not now exist, and in its place and stead, and as its successor is this plaintiff; and plaintiff is now the owner and operator of said waterworks, properties, rights, claims and privileges, and has continuously since said date carried on said business, performed all of said and all contracts, duties and obligations of said Idaho Company, dealt with defendant and all persons concerning the same as such successor, owner and operator and as obligor of all obligatory on said Idaho Company and as obligee of all due to, owing to or demandable by said Idaho Company, had it not ceased to exist, and had not

plaintiff become its successor. And for a further and second cause of action plaintiff alleges:

I.

That it refers to and makes a part of this cause of action the following portions of the foregoing complaint and first cause of action, to wit, the title and introduction, the allegations numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XV, XVII, XIX, XX, XXI, XXII, XXV.

II.

That on the 28th day of August, 1901, plaintiff became and was and ever since has been the successor of said Artesian Hot and Cold Water Company (also herein called the "Idaho Company"), and as such took, held and has possession of all the business, properties, rights, franchises and privileges formerly owned, held, possessed and enjoyed by said Idaho Company, and at all times since August 28, 1901, has carried on the water company business in the same manner and under like circumstances, conditions and contracts as the business had been carried on in said year of 1901 prior to said date of successorship by said Idaho Company.

III.

That at all times since the 28th day of August, 1901, the said waterworks, waters, pipes and properties have been in same state and condition and under same advantages, and disadvantages, under same burdens, obligations and duties, and surrounded by same circumstances as they were in said year prior to August 28th, 1901. That at all times since said time when plaintiff became such said successor of said Idaho Company the defendant has

been surrounded by like circumstances, under same conditions, duties and obligations, and in like relation respecting said waters, waterworks and properties as it was prior to August 28th, 1901, and has conducted itself in same manner toward plaintiff as it did toward said Idaho Company in said year prior to the date of said successorship.

IV.

That at all times since August 28th, 1901, said defendant, without plaintiff's consent against the notice and protest of plaintiff and wrongfully, has maintained and enforced the provisions of Ordinance No. 104 of said city requiring plaintiff to furnish water to said city for street sprinkling free of charge, and without compensation or promise of compensation, and has wrongfully and by force taken and caused to be taken from plaintiff's waterworks its said waters, and used the same upon the streets of said city, both at street and alley crossings and at the portions and parts of streets in front of properties and lots owned and occupied by private persons, and has wrongfully meddled with, tampered with, changed and interfered with plaintiff's said waterworks and properties, all without plaintiff's consent, and against protest of plaintiff and by force, has continuously taken said waters for street sprinkling purposes, both its hot water from its hot water pipes and system, and its cold waters from its cold water pipes and system; and has claimed and does claim to do so by right under said ordinance and otherwise, and has done all this with notice that it will pay nothing for said waters or any of them, and that it is entitled to plaintiff's said waters for street sprink-

ling free of charge, and defendant, to obtain said waters, took and takes control of, took and takes possession of and uses, by force, plaintiff's said stand-pipes and water pipes, valves and machinery, wrongfully, forcibly and against the wishes, without the consent, and under protest of the plaintiff; that defendant has not only during said time taken plaintiff's said waters for such street sprinkling purposes, but has also wasted said waters and large quantities of the same, and has so improperly and unskillfully taken said waters, and used and handled plaintiff's pipes and properties as to allow and cause large quantities of said waters to be wasted and lost, and so as to cause great damage to plaintiff.

V.

That defendant has during said times—that is, from the 28th day of August, 1901, down to the first day of January, 1902, so taken of plaintiff's said waters, from its said water pipes and system, waters to the amount of 25,480,000 gallons and used and caused the same to be used upon its streets for sprinkling the same.

VI.

That during said year of 1901 from and after August 28th, defendant in so taking said waters for sprinkling its streets and by and in consequence of its wrongful using and meddling with plaintiff's said waterworks and properties has wasted and caused to be wasted, of plaintiff's said waters, waters to a large amount and to the amount, as plaintiff is informed and believes, of 16,000,000 gallons, to plaintiff's great damage and injury and to plaintiff's damage of two thousand dollars.

VII.

That the waters taken for street sprinkling by defendant were then and there of the worth and value of twelve and one-half cents per thousand gallons and of the worth and value of $3,160.00.

VIII.

That the waters of plaintiff so wasted and caused to be wasted by defendant were than and there of the value of and worth of twelve and one-half cents per thousand gallons and of the total value of $2,000.00.

IX.

That of the waters so taken and used by defendant for sprinkling of its streets in said year 1901 and since August 28th of that year, defendant took and used for sprinkling such portion of its streets as were street intersections and alley crossings, water of the then value of $760.00, to plaintiff's damage $760.00, and took and used for sprinkling such portions of its streets as were in front of lots owned by other and private persons waters of the value of $2,300.00.

X.

That of the waters so taken and used by defendant during said time for street sprinkling a large portion was for street sprinkling, and so used, on the streets of said city in blocks where said Peter Sonna furnishes water to the inhabitants thereof and those doing business thereon, and as plaintiff is informed and believes, to the great worth, value and amount of, to wit, $900.00, and so alleges, and to plaintiff's great damage then and there, to wit, in the sum of $900.00.

Wherefore plaintiff demands judgment against defendant for: First, for damages in the sum of $15,560.00; second, for costs of this action.

KINGSBURY & KINGSBURY,
Attorneys for Plaintiff.

State of Idaho, } ss.
County of Ada. }

B. S. Howe, being duly sworn, says: I am secretary of the Boise Artesian Hot and Cold Water Company (Limited), plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those portions stated on information and belief and as to those portions I believe it to be true.

B. S. HOWE.

Subscribed and sworn to before me this 12th day of February, 1902.

[Seal] W. S. BRUCE,
Notary Public.

[Endorsed]: No. 199. Circuit Court of the United States, District of Idaho. Boise Artesian Hot and Cold Water Company (Limited), Plaintiff, vs. Boise City, Defendant. Complaint. Filed February 12, 1902. A. L. Richardson, Clerk. Kingsbury & Kingsbury, Attorneys for Plaintiff.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,

vs.

BOISE CITY.

No. 199.

Summons.

The President of the United States, to Boise City, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled Court, holden at Boise in said District, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, if served within the county of Ada in said District, or if served within any other county of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of $15,560.00, together with costs of suit, upon the grounds set forth in plaintiff's complaint on file herein, a certified copy of which said complaint is served herewith and made a part hereof. Said demand being a claim of plaintiff for damages for taking water for street sprinkling for the years 1900 and 1901, of the value above and damages set forth, on two causes of action—first, for $10,500.00 on account of damages sustained by plaintiff's predecessor; second,

for $5,060.00 on account of damages sustained by plaintiff.

And this is to command you the marshal of said District, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise in said District this 12th day of February, 1902.

[Seal] A. L. RICHARDSON,
Clerk.

MARSHAL'S RETURN.

I certify that I received the within summons at Boise, Idaho, on the 12th day of February, 1902, and that I made personal service of the same upon H. C. Parnell, as president of the council and acting mayor of Boise city, Idaho, on the 12th day of February, 1902, by delivering to, and leaving with him a true copy of this summons, together with a certified copy of the complaint in said cause.

Fees $4.00.

F. C. RAMSEY,
United States Marshal.

[Endorsed]: No. 199. In the Circuit Court of the United States for the District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, vs. Boise City. Summons. Returned and filed February 13, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, for the District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,
Plaintiff,

vs.

BOISE CITTY,
Defendants.

Demurrer.

Comes now the defendant and demurs to the plaintiff's complaint, and for grounds of said demurrer, says:

1.

That the Court has no jurisdiction of the subject of this action in that appears:

(A) That the first alleged cause of action is upon a claim alleged to have been assigned and transferred to the plaintiff, and that it further appears that the assignor could not have maintained an action upon said claim in the United States Circuit Court, for the reason that it is a citizen of the same state as defendant.

(B) That the second alleged cause of action is upon a claim alleged to have been assigned and transferred to the plaintiff, and that it further appears that the assignor could not have maintained an action upon said claim in the United States Circuit Court for the reason that it is a citizen of the same state as the defendant.

2.

That said complaint does not state facts sufficient to constitute a cause of action in that it appears, upon the face of the complaint:

(A) That this is an action to recover from the defendant city for the value of water used by the said city for fire and other great necessities, which, according to the laws of the State of Idaho, is to be furnished without charge.

(B) That the defendant is a duly organized municipal corporation under the laws of the State of Idaho, and that the plaintiff is a corporation formed to supply water to said city or municipal corporation, and that it is seeking to recover for the use of water used by said city for fire and other great necessities.

JOHN J. BLAKE and
W. E. BORAH,
Attorneys for Defendant.

State of Idaho, } ss.
County of Ada, }

I, W. E. Borah, one of the attorneys for the defendant, hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

W. E. BORAH,
Attorney for Defendant

State of Idaho, } ss.
County of Ada, }

Moses Alexander makes solemn oath and says: That he is the duly elected, qualified, and acting mayor of the

above corporation, the defendant, and that the foregoing demurrer is not interposed for delay.

M. ALEXANDER.

Subscribed and sworn to before me, this third day of March, 1902.

[Seal] H. W. DUNTON,
Notary Public.

Received copy of the above demurrer this 3d day of March, 1902.

S. B. KINGSBURY,
Attorney for Plaintiff.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company, vs. Boise City. Demurrer. Filed March 3d, 1902. A. L. Richardson. Clerk.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on the 10th day of March, 1902. Present: Honorable JAS. H. BEATTY, Judge.

BOISE ARTESIAN HOT AND COLD WATER COMPANY,
vs.
BOISE CITTY.
No. 199.

Order for Leave to Withdraw Demurrer.

Now came the defendant, by its attorneys of record, and by leave of Court, withdrew the demurrer heretofore filed to the complaint herein.

Tuesday, March 11, 1902.

BOISE ARTESIAN HOT AND COLD WATER COMPANY,
vs.
BOISE CITY. } No. 199.

Notice of Motion to Set Aside Order Allowing Defendant to Withdraw Demurrer.

Now came the plaintiff, by its attorneys, and gave notice in open court of motion to set aside order heretofore granted, giving defendant leave to withdraw its demurrer to the complaint herein.

Tuesday, March 18, 1902.

BOISE ARTESIAN HOT AND COLD WATER COMPANY,
vs.
BOISE CITY. } No. 199.

Order Correcting Entry Allowing Withdrawal of Demurrer.

On motion of counsel for plaintiff, A. A. Fraser, Esqr., was entered of record as additional counsel for plaintiff. The plaintiff's motion to set aside the order heretofore entered giving defendant leave to withdraw its demurrer to the complaint herein coming on to be heard, the respective counsel being present, it was ordered that said order be corrected to read that said defendant waive the said demurrer instead of withdrawing the same, and upon motion the said plaintiff was given twenty days from this date to plead to the answer herein.

In the Circuit Court of the United States, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMANY, LIMITED,
Plaintiff,
vs.
BOISE CITY,
Defendants.

Answer.

Comes now the defendant and for answer to the complaint of plaintiff, admits, denies and alleges:

1.

The defendant has no knowledge, information or belief sufficient to enable it to answer any or either of the allegations in paragraph one of plaintiff's complaint, and it therefore denies each and every of said allegations in said paragraph contained.

2.

Denies that the amount involved in this controversy, or to recover which this action is brought, exceeds the sum of five thousand dollars ($5,000), exclusive of interests and costs, or exclusive of interests or costs, or that it involves any sum whatever.

3.

Defendant admits that during all of the times herein mentioned, subsequent to March 28, 1891, and down to

August 28, 1901, said Idaho Company was the owner of the waterworks referred to in the complaint, and waters of great value; admits that on October 3, 1889, Boise City enacted, ordained, and passed the ordinance referred to and set forth in paragraph five of plaintiff's complaint, but as to the other and further allegations, matters and things in said paragraphs four and five of plaintiff's complaint contained, defendant has not sufficient knowledge, information or belief to enable it to answer any or either of said allegations, and it therefore denies each and every of the other and further allegations in said paragraphs contained.

4.

That defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph six of plaintiff's complaint, and it therefore denies each and every of said allegations in said paragraph contained.

5.

Denies that the Boise Waterworks Company, a corporation, formed and organized under the general laws of Idaho, as a private corporation, as successors to said Eastman Brothers, assumed no duties or liabilities, pertaining to said waterworks or to said franchise than such as appertained to the same in the hands of said Eastman brothers or to said Eastman brothers; denies that such corporation was, by all or any person or by this defendant, recognized or treated as having such duties or liabilities only as pertained to the said water system in the hands of said Eastman brothers, or to said Eastman brothers, but alleges the fact to be that said

corporation assumed all the duties and liabilities appertaining to said waterworks and water system, and to corporations, as provided by the laws of the State of Idaho.

6.

Denies that the Artesian Hot and Cold Water Company, hereinbelow designated for convenience the Idaho Company, assumed all or any of the liabilities or duties pertaining to said waterworks or in like manner or with like limitations as were assumed by or were obligatory upon the said Eastman brothers; denies that during all these times or at all, the said company did or performed all it was obligated to do by virtue of such operation, ownership or successorship, as will be hereinafter more specifically set forth.

7.

Defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph nine of said plaintiff's complaint contained, and it therefore denies each and every of said allegations in said paragraph contained.

8.

Defendant denies that said Idaho Company so dealt or was dealt with during all times or at any time down to August 28, 1901, or ever or at all, so dealt or was dealt with by this defendant as the successor of said Eastman brothers in or to the rights, privileges or franchises, or in all or any of the things that pertained to said waterworks, or that belonged to said Eastman brothers as the operators of said waterworks, or as being under said rights or privileges, in the hands of said Eastman broth-

ers, or as being under any of the rights or privileges in the operation of said waterworks; but alleges the fact to be that this defendant at all times dealt with said Idaho Company, as a corporation, organized and existing under and by virtue of the laws of the State of Idaho, for the purpose of supplying cities or towns with water, and that said Idaho Company dealt and was dealt with by this defendant during all the time as such corporation so organized and existing with all the duties and obligations belonging and appertaining to such corporations, and not, in any sense, as the successor of said Eastman brothers, in the operation of said waterworks; denies that said Idaho Company was, at any time, or at all, by this defendant known, recognized or dealt with or acknowledged as such successor of said Eastman brothers in the operation of said waterworks, and alleges the fact to be that the said Idaho Company had no other rights, privileges or franchises than those which were imposed upon it by the laws of the State of Idaho, and did not have and could not exercise any other rights or privileges than those so specified.

9.

That as to the allegations in paragraph eleven of said complaint, to wit, that the ordinary and necessary demand for water from said waterworks required, at no time during the last five years, any pumping except by one pump, and for the space of not to exceed four hours each day, and for most of that time no pumping was required at all for ordinary uses, while to supply the water for such ordinary and necessary use during these times of the customers of said company, and, at the

same time, to furnish waters used for street sprinkling by the defendant, as hereinafter set forth, did, at all times, during the sprinkling seasons for the years 1900 and 1901, require the whole capacity of a large pumping plant of two large pumps run nearly every hour by day and night, this defendant has not sufficient knowledge, information or belief to enable it to answer any or either of said allegations, and it therefore denies each and every of said allegations; denies that the said Idaho Company was compelled to do this pumping, or any pumping, by reason of the wrongful or any acts of this defendant; denies that the said company did this pumping or extra pumping at any time or at all by reason of the wrongful or any acts upon the part of the defendant.

10.

Denies that the said Idaho Company has continually or at all had dealings with Boise City or Ada County or the State of Idaho, as successor or by virtue of being successor of said Eastman brothers, but alleges the fact to be that said company has, at all times, dealt with this defendant, Ada County, and the State of Idaho, as a corporation, organized under the general laws of the State of Idaho, with all the duties and liabilities of such corporations, for the purpose of supplying cities and towns with water, and in no other manner and by virtue of no other authority, rights or privileges has said company dealt or been dealt with; denies that, as such corporation and as such successor of Eastman brothers, or as such corporation, or as successor of Eastman brothers, or in any capacity, or at all, said company has, at any time, or at all, furnished this defendant city or the inhabitants thereof, for fire purposes or for sprinkling

its streets, or for heating its buildings, or for any other purposes, water for a reasonable compensation, or that it has, at any time or at all, furnished water for said or any purposes, or at all, as the successor or by virtue of being the successor of Eastman brothers; denies that said Idaho Company, has, at any time, or at all, maintained stand-pipes or any stand-pipes in all or any parts of the defendant city, where, by contracts, it was obligated so to do, and denies that it could or was, at any time, obligated by contract to furnish stand-pipes or any stand-pipes at any place or at all within said city, or that it erected or maintained eighteen or any stand-pipes by virtue of any agreement, and denies that it was or could be obligated by agreement so to do.

11.

Denies that said Idaho Company did any or all of the things it was required to do or was obligated to do under said alleged contract or otherwise; denies that said Idaho Company was or could be obligated, by or under said alleged contract, to erect or maintain, at its own or anybody's expense, stand-pipes for the taking or use of its waters by this defendant, except as obligated by law as hereinafter more specifically set forth; denies that said company was or could be, by or under said alleged contract, obligated to erect or maintain, at its own or anybody's expense, stand-pipes for the taking or use of its waters at any place beyond the territorial extent of its voluntarily created physical and mechanical means of furnishing water for family use or for fire or other great necessity, or otherwise obligated so to do, as already devolved upon it as a corporation organized under

the laws of the State of Idaho, and formed for the purpose of furnishing a city or town with water and to the extent of its means as voluntarily created in the regular course of its business.

12.

Denies that this defendant had continually or at all dealings with such water company as the successors in interest, ownership, or operation, of said waterworks, rights or properties or at all other than as hereinafter specifically alleged; denies that said Idaho Company dealt with this defendant as such water company or that the defendant dealt with or was dealt with by said Idaho Company otherwise than as a corporation organized under the general laws of the State of Idaho, with all the duties and obligations appertaining and formed for the purpose of supplying a city or town with water for family uses and for fire purposes and other great necessities; alleges that the dealings referred to in paragraph fourteen of plaintiff's complaint and alleged to have been had by and between said Idaho Company and this defendant by virtue of contracts, were not performed or carried out reasonably or fairly or legally.

13.

The defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph fifteen of said complaint, and it therefore denies each and every of said allegations in said paragraph contained.

14.

Denies that the said Idaho Company has not assented to or accepted or recognized the validity or binding effect

of the ordinance of this defendant granting to said Idaho Company the right to collect charges for water supplied to the inhabitants thereof, which ordinance is specifically referred to in plaintiff's complaint; denies that, after the passage of said ordinance or at all, this defendant took or caused to be taken water of the said Idaho Company from its water pipes or otherwise by force or at all other than as hereinafter specifically alleged; denies that under or by virtue of said ordinance or at all, the police of this defendant city protected or enforced the taking of said water or the meddling with the waters or the pipes or the property of said company; denies that this defendant, by its police or police power or in any manner, enforced said ordinance or that it took the water for the street sprinkling or for any other purpose by force other than as hereinafter specifically alleged.

15.

Denies that, at all times or at all since March, 1900, or prior to August 28, 1901, or at any time or at all, this defendant took over two hundred and fifty thousand (250,000) gallons of water each on any day or any amount of water from said waterworks system of the said Idaho Company, by force or at all or in any manner other than as hereinafter specifically alleged; denies that, by reason of said alleged taking or of any act or acts upon the part of this defendant, the Idaho Company was damaged at any time or at all in the sum of fifty-five dollars ($55.00) each day, or in any sum whatever, and alleges the fact to be that the said Idaho Company was not, in any manner or at all, damaged in any sum whatsoever, by reason of any act or acts upon the part of this defendant.

16.

Denies that one Peter Sonna or any other person or persons, firm or association exercises rights, privileges or franchises in the supplying of water to the inhabitants of Boise City under the same or like kind of powers or privileges or under the same or like grants or franchises as those of the said Idaho Company; denies that any other person or persons enjoy or enjoys or during said last four years or any years or at all have enjoyed grants or rights or privileges with the said Idaho Company in supplying Boise City or its inhabitants with water; and alleges the fact to be that the said Idaho Company has alone enjoyed the rights, privileges and franchises of supplying water to Boise City and the inhabitants thereof; denies that this defendant city has, by force, taken water from said Idaho Company at any time or at all; denies that it took water, proclaiming that no compensation need be or would be given for the same, because said company was a corporation, or in any other manner or with any other purpose or motive than as hereinafter specifically alleged.

17.

Denies that immediately or at all after the passage of said ordinance or at all, the defendant, by its officers, agents or servants, or otherwise or at all, by force, took possession of any stand-pipes or fire hydrants or either of them, forcibly or in any other manner or way than as hereinafter specifically alleged; denies that from or through said stand-pipes of the plaintiff or said fire hydrants, or either of them, this defendant took water wrongfully or willfully or by force at any time or at all

for any purpose or at all other than as hereinafter specifically alleged; denies that this defendant, in any manner or at all, or by reason of any act or acts, damaged or injured the said Idaho Company or damaged or injured any other company in the sum of eleven thousand dollars ($11,000) or in any sum whatsoever, but alleges the fact to be that the said Idaho Company nor this plaintiff has not, by reason of any act or acts upon the part of this defendant, suffered damage or been injured to the amount of eleven thousand dollars ($11,000), or any sum or sums whatsoever.

18.

Denies that there was no great necessity or necessity upon this defendant for taking said Idaho Company's water during said times for street sprinkling and other purposes; denies that it wrongfully took said waters or that it took said or any waters from the Idaho Company wrongfully or for any purpose or at all other than as hereinafter specifically alleged.

19.

Denies that during the years 1900 or 1901 or at any time or at all, this defendant wrongfully took water from said Idaho Company or from the stand-pipes of said company or its hydrants either within or without said city or in any other manner than as hereinafter specifically alleged; denies that during said years or at any time or at all, this defendant took the water from either or any of said stand-pipes or fire hydrants other than as hereinafter specifically alleged.

20.

Denies that the Idaho Company could not have prevented or stopped the defendant from taking its said water without shutting off all or any of its supply of water to its customers, or without interfering with or preventing its own use of said waters or endangering all or any of the property of said city or other properties in any manner, or at all, or the lives or health of the inhabitants of said city.

21.

Denies that said Idaho Company was, at any time, unable to go to the cost or expense or labor of furnishing, free water to this defendant, or that it was unable to furnish, free of charge, the waters required by this defendant or taken during the times aforesaid for street sprinkling or other purposes; denies that such demand or demands were beyond the means of such water company; denies that the cold water system or any other water system of said waterworks must be, under the circumstances given or under any circumstances, run without profit or at a loss to its owners or operators for any reason or at all or because of water taken from it for street sprinkling or for any purpose, and denies that, for any reason or at all, said waterworks or waterworks system has been run or must be run without profit or with loss to the owners.

22.

Denies that the waters taken by the defendant for street sprinkling or for any other purpose were unnecessarily or wrongfully taken or taken in any other manner than as hereinafter specifically alleged.

23.

Denies that, in the year 1900, or at any time or at all, said defendant took from the Idaho Company's waterworks for street sprinkling or for any purpose forty-nine million three hundred and seventy thousand (49,370,000) gallons, or any water, other than as hereinafter specifically alleged, and denies that, by reason of the taking of said water or any water, the said company or any other company or anyone was damaged in the sum of ten thousand five hundred dollars ($10,500), or any sum or amount whatsoever, and alleges the fact to be that neither the said Idaho Company nor any other company has been, by reason of the taking of any water upon the part of the defendant or by reason of any act or acts upon the part of the defendant, damaged in any sum or in any manner whatever.

24.

Denies that the water so taken by said city during the years 1900 or 1901 from said company's waterworks was, in any manner or at all, taken for the benefit of certain persons as owners of lots abutting on streets sprinkled, or for the purpose or with the intent or design of saving said owners a portion or any of the cost or expense of such sprinkling; denies that such taking had the effect of taking the water or property of the Idaho Company and giving it to other persons or to any persons free of charge; denies that the amount so taken was taken for the benefit of any owners of abutting property; denies that the water so taken was taken to the damage of said Idaho Company or to the damage of anyone to the amount of seven thousand five hundred dollars ($7,500), or to any

other amount, or to the damage of said Idaho Company, or to anyone else in any manner or at all; denies that this defendant city tampered with or meddled with said Idaho Company's pipes and fire hydrants or pipes or fire hydrants; denies that, in the taking of waters for street sprinkling or otherwise, during the years 1900 and 1901, by this defendant, in any manner or at all or at any time or times, which caused great or unnecessary or any waste of water; denies that large or any quantities of water were allowed to run or did run to no benefit, or that the same was allowed, in any quantity or at all, or by any manner of taking, to run to no benefit or use or to the great or any damage of said Idaho Company, or to the great or any damage of anyone in the sum of one hundred and eighty-seven dollars and fifty cents ($187.50), or in any sum whatever, or to the loss or waste of water to the amount of one million five hundred thousand (1,500,000) gallons, or to any amount or of any value whatever.

25.

Denies, on information and belief, that on the 28th day of August, 1901, or at any time or at all, the said Idaho Company, decided or resolved or determined to or did go out of business or out of existence, or to make plaintiff its successor in its said business or to all its rights, properties, privileges, franchises, claims or contracts or demands; denies, on information and belief, that pursuant to said or any decision or at all, said Idaho Company did turn over or transfer or assign or convey to plaintiff all or any of its properties or business or claims or demands or accounts or rights or privileges or

franchises or waterworks, or all or any of its claims or rights or contracts connected with said business, or all or any of its moneys or damages or claims due or owing to it either from contract or from tort or trespass or from noncontract sources, or its claim or any claim against this defendant, and defendant alleges that, at no time, did the said Idaho Company have any claim of any nature or kind against this defendant, and that said Idaho Company did not and could not transfer its rights, privileges or franchises in and to the furnishing of water to the inhabitants of Boise City and to Boise City, as required by law, without the consent of this defendant; denies, on information and belief, that said plaintiff did, at any time or at all, accept or could accept the business or the rights, properties, privileges, franchises, claims or contracts or demands of the said Idaho Company, or that it entered into the possession of the same, or go on in or with said business, or assumed or agreed to pay all or any claims of said Idaho Company, or did enter into or carry on or out all or any of the business or contracts or duties or obligations with or to any other person or in any other way or manner or respect whatever; denies, on information and belief, that since August 28, 1901, or at any other time, plaintiff has been, in any respect or at all or for every purpose or in any manner or at all, the successor of the said Idaho Company; denies that the plaintiff is or has been known or recognized or treated by this defendant as the successor of the said Idaho Company, or that the plaintiff, as such successor, deals or has dealt with this defendant, or that by the defendant the plaintiff has been or is accepted,

known or recognized as the successor of said Idaho Company; denies, on information and belief, that in the place or stead of said Idaho Company or as its successor, is this plaintiff; denies, on information and belief, that the plaintiff is now, or at any time has been, the owner or operator of said waterworks, properties, rights, claims or privileges; denies, on information and belief, that plaintiff has continuously or at all, since August 28, 1901, or at any time, carried on the business or performed all or any of the acts, duties or obligations of said Idaho Company; denies that the plaintiff dealt with the defendant concerning all or any of said alleged contracts or duties or obligations of said Idaho Company, or dealt with the defendant concerning any contract, duty or obligation as such successor, or dealt with the defendant as owner or operator or as obligor of said Idaho Company, and denies that plaintiff has, at any time or at all, or in any manner, become the successor of the Idaho Company.

26.

Defendant, further answering first cause of action herein, says:

(A) That, at the date of the passage of the ordinance set forth in paragraph 5 of the complaint, and long prior thereto, the said H. B. Eastman and B. M. Eastman had laid and repaired their water pipes in, through and along and across the streets and alleys of Boise City and had exercised already, prior to the passage of said ordinance, all rights and privileges, and enjoyed all benefits at any time by them exercised or enjoyed; that said ordinance was passed merely in confirmation of the rights already

assumed and did not confer, and was not intended to confer, upon said Eastmans any other rights or any greater rights, privileges or benefits than they had theretofore exercised and enjoyed, and said ordinance did not create or give rise to any special or exclusive exemptions or privileges, or create or give rise to any contractual relations of any nature or kind to or with the said Eastman brothers and this defendant.

(B) That the Boise Waterworks Company, a corporation organized and existing under the laws of the State of Idaho, was organized and formed for the purpose of furnishing water to the city of Boise, and that, as such, it became its duty to secure the authorization of this defendant city to supply said city with water, and thereupon to join with this defendant in selecting commissioners, as provided by law, to determine reasonable rates for water so supplied by said corporation for family use, and thereupon it became its duty to furnish pure, fresh water to the inhabitants of Boise City for family use, so long as supply permitted, and without distinction of person, upon proper demand therefor at rates as established by said commissioners, and to furnish water to the extent of its means in case of fire or other great necessity, free of charge, but all of which said duties said corporation failed, neglected and refused to do; that said corporation enjoyed no exemptions, rights, privileges or franchises other than those given and imposed by law upon such corporations, upon a full compliance with the law.

(C) That said Artesian Hot and Cold Water Company, a corporation formed and organized under the laws of

the State of Idaho, was formed and organized for the purpose of supplying water to the city of Boise, and as such became and was the successor of the Boise Waterworks Company and of the Artesian Water and Land Improvement Company, corporations organized and existing under and by virtue of the general laws of Idaho, formed for the purpose of supplying water to the city of Boise, and became bodies corporate for such purposes, subsequent to twelve o'clock, noon, June 1, 1887, and said Artesian Hot and Cold Water Company was and has been known and recognized only as a corporation organized and existing under the general laws of Idaho, formed for the purpose of furnishing water to the city of Boise, with all the duties and obligations appertaining to such corporations, and that, as such corporation, it became charged with the duty to secure the authorization of this defendant city to supply said city with water, and thereupon to join with this defendant city in selecting commissioners, as provided by law, to determine reasonable rates for water so supplied by said corporation for family use, and thereupon it became its duty to do each and every of the things required by the laws of Idaho, to be done by corporations so organized and formed for such purposes, including the furnishing of water to the extent of its means in case of fire or other great necessities, free of charge, but of which said duties of furnishing water at rates established by commissioners selected as provided by law, or to furnish water to the extent of its means in case of fire or other great necessities, said corporation failed, refused and neglected to do. That said Artesian Hot and Cold Water Company, continued to act

as such corporation, as defendant is informed and believes, and therefore alleges, until January ———, 1902. That, as such corporation so formed for the purposes aforesaid, the Artesian Hot and Cold Water Company, did not assume, nor was it relieved of any duty or liability imposed by law by reason of coming into possession of the waterworks formerly owned by said Eastman brothers, but acquired by transfer from the Boise Waterworks Company, a corporation organized in like manner and for like purposes as said Artesian Hot and Cold Water Company, and acquired the same, independent of any or all duties or liabilities or privileges or exemptions by anyone else held, owned or claimed, other than such duties, liabilities and obligations as were and are, by law, imposed. That it acquired and owned all the properties, rights, franchises and privileges of the Boise Waterworks Company and of the Artesian Water and Land Improvement Company, and operated the same as a corporation organized in the manner and for the purposes aforesaid, under the general laws of the State of Idaho, and, as such corporation, so operating said properties, rights, franchises and privileges, it became and was its duty to do and perform each and every of the things required of such corporation to be done in and about the furnishing of water to Boise City, including the duty to secure authorization by an ordinance of the defendant city to supply said city with water, and its further duty to furnish water to the extent of its means in case of fire or other great necessity, free of charge, but that, notwithstanding such duty to secure such authorization prior to March, 1900, no authorization, by ordi-

nance of said city, had been sought or given by the defendant to said corporation. That on April 9, 1900, the defendant city passed an ordinance granting to the Artesian Hot and Cold Water Company authority to furnish water to the inhabitants of Boise City, and to collect rates therefor, a copy of which said ordinance is hereto annexed, marked Exhibit "A," and made a part of this answer. Whereupon, said corporation became, for the first time, authorized to furnish water to the inhabitants of said city at reasonable rates, or at any rates or at all, for compensation. That said corporation continued to carry on its said business of supplying said city with water and of collecting rates therefor for water supplied to the inhabitants thereof for family use, after the enactment and approval of said ordinance and with full notice thereof, but at rates arbitrarily adopted, fixed and charged by it, and without reasonable rates having been determined by commissioners selected as provided by law for such purpose. That said corporation, incorporated in the manner and for the purposes aforesaid, and so authorized to furnish water as aforesaid to the inhabitants of said city, and continuing so to do subsequent to the passage and approval of said ordinance and with full notice thereof, assumed the duty and obligations to furnish to the inhabitants of Boise City water to the extent of its means in case of fire or other great necessity, free of charge, but to furnish the same free of charge for street sprinkling and other great necessities in said Boise City, to the extent of its means or otherwise, free of charge, said corporation failed, refused and neglected, and continues to so fail, refuse, and neglect to do. That,

at no time, nor by reason of any grant, ordinance or contract, either with said Idaho Company or with anyone else, has it been relieved or exempted from the duties imposed by law upon corporations organized for the purposes aforesaid.

(D) That prior to April 19, 1900, the said Artesian Hot and Cold Water Company, as such corporation, formed in manner and form and for the purposes aforesaid, was without authority of law to exercise the rights, privileges or franchises of furnishing water to the inhabitants of Boise City for rates or compensation, for the use of water supplied to said Boise City or the inhabitants thereof for family use, and that said corporation exercised said right, privilege and pretended franchise without authority of law and in a manner other than prescribed by law, and after the passage and approval of said ordinance, and after full notice thereof, continued to so exercise said pretended franchise in a manner contrary to law and contrary to the duties and obligations imposed by law.

That said corporation was without authority to contract concerning rates or compensation for the supplying of its water to the inhabitants of Boise City for family use or for furnishing water to the extent of its means in case of fire or other great necessity; that no rate to be charged for water for family use had been determined by commissioners selected as provided by law, and which said rate said corporation was authorized to charge, collect or receive for water supplied by it for family use, or for fire or street sprinkling or other great necessity, nor could such commissioners determine any rate to be

charged, collected or received for any purpose denominated a great necessity. That, as to any pretended contracts made or entered into by and between said corporation and the owners or lessees of abutting property on streets sprinkled with water supplied by said corporation or as to any pretended contracts by and between said corporation and this defendant, concerning reasonable compensation, agreed rates or any rates or compensation whatever for water furnished by it for fire or street sprinkling purposes or other great necessities, the same were beyond the power of said corporation or of this defendant to make or exercise and against public policy, illegal and void.

That, as to any and every pretended contract by and between this defendant city and the said Artesian Hot and Cold Water Company, alleged to have been made and entered into in the year 1897, wherein it assumed to contract respecting the supplying of water for street sprinkling purposes or other great necessities at a reasonable agreed price or at any compensation, agreed rate or at any rate for such services, the said contracts and each and every of them were beyond the power of either said corporation or of this defendant city to make or execute, and the same were without consideration to this defendant and against public policy, illegal, null and void. That, as to each and every pretended contract by and between the said Artesian Hot and Cold Water Company, and this defendant, wherein and whereby this defendant agreed to purchase waters of the said corporation for street sprinkling purposes or for fire or other great necessities, the said contract was beyond the power of said corporation or of this defendant to make or

execute and, as to this defendant, was without consideration, and the same was against public policy, illegal and void.

(E) That said Artesian Hot and Cold Water Company, at all times since its incorporation as aforesaid, notwithstanding its duty to furnish water to this defendant for fire or other great necessity, free of charge, and notwithstanding that demand upon said corporation has been made on numerous occasions that it furnish such water for such purposes free of charge to this defendant, it has failed, refused and neglected so to do and has demanded compensation therefor, and demanded that contracts be entered into agreeing to pay for the same; that each and every of said pretended contracts, and particularly, the contracts, and each and every of them, alleged in paragraph 13 of plaintiff's complaint to have been made and entered into by and between this defendant and said corporation in each of the years 1898 and 1899, wherein and whereby said corporation pretended to assume any obligation to erect or maintain stand-pipes when and where requested by said defendant, and assumed to be authorized to charge, collect or receive certain rates, or any rates, for water for fire or other great necessities, or wherein or whereby this defendant assumed to contract for such service or the furnishing of said waters for street sprinkling purposes at certain rates or at any rates, and the entire of said contracts were beyond the power of either said corporation or this defendant to make, or execute, and that the same and each of them, and all things done or assumed to be done by either of the parties thereto under said contracts, or either or any of them, were and

are against public policy, that the same were and are without consideration as to this defendant, illegal, null and void.

(F) That, as to each and every of the pretended contracts alleged in paragraph 14 of plaintiff's complaint, by and between the Artesian Hot and Cold Water Company, and this defendant, and concerning the furnishing of water by said corporation to the inhabitants of this defendant for domestic use or for fire or other great necessities, or concerning the extra cost, labor, or expense alleged to have been incurred by said Artesian Hot and Cold Water Company in the furnishing thereof or in increasing its water pressure or in the erection of standpipes or in the increasing of its pumping plant or in the purchase of a steam-boiler, engine or pump, or in various other expenses to the extra cost as alleged, of over twenty thousand dollars ($20,000) over and above what would otherwise have been or is required or necessary for supplying water to the patrons of said waterworks for all other purposes than street sprinkling, or concerning any cost or extra expense or extra cost in any sum whatever, incurred by said corporation in furnishing water to the inhabitants of this defendant to the extent of every means created by said corporation for fire or other great necessity, the same is beyond the power of said corporation or of this city to make or execute and each and every of the contracts therein alleged to have been made or executed between said corporation and this defendant is without consideration upon the part of this defendant, against public policy, illegal and avoid.

(G) That each and every of the several and separate

contracts alleged in paragraph 16 of plaintiff's complaint to have been made and entered into by and between the Artesian Hot and Cold Water Company and this defendant for each of the years 1896, 1897, 1898, and 1899, relating to compensation for said water and for extra outlays and expenses were beyond the power of either said Artesian Hot and Cold Water Company, or of this defendant to make or execute, and were, as to any and every agreement of this defendant therein to pay to said corporation compensation for the use of water furnished by said corporation to this defendant city for municipal purposes in connection with its governmental or police powers, other than for such uses as are strictly family uses or as to any and every agreement to pay extra outlay or expense, and the entire of said contracts were without consideration to this defendant, against public policy, illegal, null and void.

(H) Defendant alleges that the sole authority, right, privilege and franchise of the Artesian Hot and Cold Water Company to supply Boise City with water was and is dependent upon authority conferred upon said corporation by Ordinance No. 304, passed and approved April 19, 1900, hereto annexed, as Exhibit "A," and by virtue of the law of the State of Idaho, relating to such corporations, and that the said company has no other rights, privileges or franchises or exemptions of any nature or kind; that said corporation continued to furnish water to said Boise City, and to the inhabitants thereof for family use and upon demand therefor and thereafter continued to assume to exercise a right and franchise to collect rates charged for water so furnished, thus and thereby, in so continuing so to supply water,

collect rates and to exercise the rights and privileges and franchises of a corporation organized under the general laws of the State of Idaho, formed for the purpose of supplying a city or town with water, the said corporation assented to, accepted and recognized the validity and binding effect of said ordinance and the duties and obligations imposed by law, and was thereunder, and as such corporation, so organized in manner and form, and for the purpose aforesaid under the duty and obligation, and legally required to furnish this defendant city water to the extent of its means in case of fire or other great necessities, free of charge; that thereupon, this defendant city served written demand upon said corporation that it furnish water for fire and for sprinkling streets in Boise City, a copy of said demand being hereto annexed, marked Exhibit "B," and made a part of this answer, along with which was served, also, a copy of the ordinance of Boise City, No. 304, and thereupon and thereafter took the waters of said corporation from its stand-pipes and other means of furnishing the same and within means created by said corporation; and by its authority as the governmental power of Boise City, and as the agency of the inhabitants thereof for the use of waters furnished for fire or other great necessities to said city, and in a skillful manner, and without waste, this defendant took said water alleged in plaintiff's complaint to have been so taken for fire and sprinkling purposes, as it might of right do, without any liability for any rates or compensation whatsoever therefor, and without let or hindrance from said corporation while so doing, and taking, and that said water was wholly without value in contemplation of law as to said com-

pany, as the said company was not permitted to charge for the same; that Boise City is situated in a dry and arid region; that by reason of a large and growing traffic in and upon and over the streets of said city and during the months when there is not sufficient rainfall to keep the said streets free from dust, the same become deep with dust, and the same is raised by passing vehicles, horsemen and stock driven in and over said streets and through said city and fills the air therewith, and the same becomes offensive to the senses, unhealthful to breathe, and dangerous to the life and health of the inhabitants of said city, whereby and by reason thereof, the sprinkling of said streets to the extent of the means furnished by said company, was and is a great necessity, and for such and under such circumstances, the said water was taken.

(I) That the Artesian Hot and Cold Water Company is a corporation, organized under the general laws of Idaho, for the purpose of supplying Boise City, with water, and enjoys all of the rights, privileges, and powers granted to a private corporation, organized for such purposes, under the laws of Idaho, and no other; that, by and under the terms of its charter, from the State of Idaho, it became charged with the duty and obligation of furnishing water to the extent of its means, in case of fire or other great necessities, free of charge, to the city in the exercise of its police and governmental power, but without compensation for water so furnished or used; that by the constitutional and statutory provisions of the State of Idaho, the same being also a part of said corporation's charter, it is provided that rates to be charged for water must be determined by commission-

ers to be selected, two by the water company and two by the city or town authorities, and further as provided by law in case of their disagreement as to valuation; that said commissioners are thereupon authorized to determine the rate to be charged for water for one year and until new rates are fixed by the action of a majority of said commissioners; that it is the duty of said commissioners to fix reasonable rates for water furnished for family use, and that for such use only are said commissioners authorized to fix any rate. That, for the purpose of determining the reasonableness of the rate fixed for such family use, all conditions entering into the cost to a water company of maintaining a plant and supplying such water, and all water for fire or other great necessities, furnished to the city, free of charge, may be taken into consideration, and such a rate fixed for such family use as shall furnish a profit upon the amount clearly and necessarily invested in the business of such water company; that the right to collect rates or compensation, for the use of water supplied to any city or town, or inhabitants, thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law. That heretofore and in continuing to the present time, no measure has been prescribed by law, providing for the exercise of such franchise in Boise City by other than corporation organized under the laws of the State of Idaho, formed for the purpose of supplying cities and towns with water; that plaintiff is the sole and only corporation now, or at any time heretofore so organized, or authorized to furnish water in said city, for rates of compensation; that it is the sole and only corporation now, or at any time,

hereinbefore actually engaged in supplying water to the inhabitants of Boise City, and having a franchise, and in manner provided by law under which it is authorized to collect rates for the furnishing of water for family use or from which defendant can demand, require or take water for street sprinkling, fire or other great necessities, free of charge, or for any purpose, or at all; that no other person, persons, firm or association or corporations, is or are by law authorized to collect rates or compensation for furnishing water to the inhabitants of Boise City for family use.

(J) That as to each and every of the pretended contracts alleged in paragraph 12 of plaintiff's complaint, to have been made by and between the Artesian Hot and Cold Water Company, and this defendant, the same were beyond the power of either said corporation or this defendant to make or execute, and each and every of said pretended contracts was, as to this defendant, without consideration, against public policy, illegal, null and void.

(K) That the taking of the waters alleged in the plaintiff's complaint, to have been taken by defendant for street sprinkling purposes was a great necessity to this defendant, by reason of the facts hereinbefore alleged as to the necessity for said sprinkling, and that said water, under the law, was not of any value to the plaintiff or the Idaho Company; that, by reason of such necessity, the Artesian Hot and Cold Water Company, as such corporation, organized, formed and authorized as aforesaid, was, at all times, and is charged with the duty and obligation of furnishing to this defendant water for fire or other great necessities, free of charge, and

without regard to other possible means of securing water for such purposes.

(L) That at all times herein mentioned, the courts of the State of Idaho, and of the United States, are open and exercising both law and equity jurisdiction, and with adequate remedy to prevent forcible or unlawful or illegal trespass upon the rights and property of said Artesian Hot and Cold Water Company or of said alleged Boise Artesian Hot and Cold Water Company, but to invoke said powers to said end, they have failed and neglected to do, and elected to continue the business of furnishing water to the inhabitants of Boise City, collecting rates therefor, under authority, so to do, as a corporation organized under the laws of Idaho and authorized thereunto by an ordinance of this defendant and thereby voluntarily assumed the duty of furnishing water for fire or other great necessities to this defendant city free of charge.

(M) That this defendant city has as a governmental authority of said Boise City control over the streets of said city, and is charged, under its police power, with the health, safety, comfort and welfare of the inhabitants thereof; that by reason of the condition of the streets of said city during the period of the year when the same would be dry and dusty, the sprinkling of such streets is a great necessity to the health, comfort and welfare of the inhabitants of said city, and is peculiarly a governmental function of this defendant, exercised not in behalf of persons who are owners of lots abutting on streets, sprinkled in said city, but in behalf of the health, comfort and welfare of each and all of the inhabi-

tants thereof within the available means for such sprinkling.

SECOND CAUSE OF ACTION.

Defendant, for answer to the allegations in plaintiff's second cause of action contained, admits, denies and alleges:

1.

That it refers to and makes a part of its answer to the second cause of action the following portions of the foregoing answer and first cause of action, to wit, the title and introduction and the allegations contained in paragraphs from one to twenty-five, inclusive.

2.

Denies, on information and belief, that on the 28th day of August, 1901, or at any time, the plaintiff became or was, or ever since has been, or now is, or at any time, was, the successor of the said Artesian Hot and Cold Water Company (also called herein the Idaho Company), or took, held or has been in possession of all or any of the business, properties, rights or franchises or privileges formerly owned, held or preserved, or enjoyed by said Idaho Company; denies, on information and belief, that at any time or at all, the plaintiff was or ever has been the successor of said Idaho Company; denies, on information and belief, that, at any time since August 28, 1901, or at any time, or at all, plaintiff became such successor of said Idaho Company.

3.

Denies that at all times since August 28, 1901, or at any time, defendant has wrongfully or that at any time defendant did wrongfully maintain or enforce the pro-

visions of Ordinance No. 104, or the provisions of Ordinance No. 304, or provisions of any ordinance, or wrongfully compelled plaintiff to furnish water for street sprinkling free of charge or enforced said ordinance in any other manner than as hereinbefore in the further answer of the second cause of action specifically alleged; denies that it has wrongfully or by force taken or caused to be taken from plaintiff's waterworks or any waterworks, its said water; denies that it has wrongfully or otherwise meddled with or tampered with or changed or interfered with plaintiff's waterworks or properties, or any waterworks or properties; denies that it has continuously or at any time or in any manner or at all, by force, taken said waters for street sprinkling, or at all, by force, has taken any waters; denies that to obtain said waters or any waters, defendant took or takes possession of or uses by force or that it took or takes control of, or that it took or takes possession of, or uses by force, plaintiff's said or any stand-pipes or valves, or machinery, or water pipes forcibly; denies, on information and belief, that it has taken plaintiff's said waters or any waters of plaintiff during said time for street sprinkling purposes, or for any purposes, or that it has taken the waters of plaintiff at all; denies that defendant has wasted said waters in any manner or at all; denies that it has improperly or unskillfully taken said waters or any waters, or that it has used or handled plaintiff's or any pipes or properties, as to allow or cause water or waters to be wasted or lost, or so as to cause great or any damage to plaintiff or any damage to anyone; but alleges the fact to be that the defendant has not taken, used or had anything to do whatever with

the water or anyone or in any other manner than as hereinbefore specifically alleged in the further answer of the defendant to the first cause of action.

4.

Denies, on information and belief, that during the said time alleged in paragraph 5 of plaintiff's second cause of action, or at any time or at all, defendant has taken any of plaintiff's said water or any water of plaintiff.

5.

Denies that during said year of 1901, or at any other time, defendant, in taking said waters for sprinkling its streets, or by any taking, or in consequence of its using said waterworks or properties, or in consequence of using in any manner said waterworks or properties, or by reason of any act or acts of this defendant, it has caused any water to be wasted in any amount whatever, or has damaged or injured the plaintiff or anyone else in any sum or at all.

6.

Defendant has not sufficient knowledge, information or belief to enable it to answer the allegations in paragraph 7 of plaintiff's complaint in the second cause of action contained, and it therefore denies each and every of said allegations in said paragraph contained.

7.

Denies that the waters of plaintiff or of any other person, or any waters, were wasted or caused to be wasted by defendant; denies that said waters, or any waters, wasted or caused to be wasted, by the defendant were of the value or worth of twelve and one-half cents per

thousand gallons, or of any value, or of the total value of two thousand dollars or of any value.

8.

Denies that of the waters so taken or used by defendant, for sprinkling its streets in said year 1901, or since August, 1901, defendant took any water to the damage of plaintiff or to the damage of anyone in the sum of seven hundred and sixty dollars and fifty cents ($760.50), or any other sum; denies that there is any liability either upon the part of this defendant city or upon the part of any private person or persons for water used for sprinkling in front of lots or at all for the sum of two thousand three hundred ($2,300), or any sum whatsoever.

9.

Denies that the waters so taken or used by defendant for street sprinkling on the streets of said city where said Peter Sonna furnished water to the inhabitants thereof, at any place, or at all, were taken to plaintiff's or anyone's great damage, or any damage, to anyone in the sum of nine hundred dollars ($900.00), or in any sum whatever. Defendant further answering plaintiff's second cause of action, alleges:

(A) That if said Boise Artesian Hot and Cold Water Company is a corporation as alleged in the complaint, and empowered to do business in the State of Idaho, then it is formed for the purpose of carrying on the business of furnishing water to cities and towns in Idaho, and is charged with all the duties, liabilities and obligations devolving upon a corporation formed for like purpose under the general laws of the State of Idaho, and is charged with the duty and obligation to furnish

to this defendant to the extent of its means water for fire or other great necessities, free of charge.

10.

The defendant, for further answer to the plaintiff's second cause of action, refers to and makes a part of the answer to this cause of action the further answer to the plaintiff's first cause of action, from paragraphs A to M, inclusive.

11.

The defendant further answering herein, says; that plaintiff should not further have or maintain this suit against the defendant, and says: that the alleged cause of action set forth in plaintiff's complaint accrued, if at all, by reason of dealings had by and between this defendant city and the Artesian Hot and Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho; that, as such, between March ———, 1891, and January 28, 1902, a period of over ten years, it has been engaged in furnishing water to the inhabitants of this city for family use and to this defendant for fire and other great necessities, and defendant says; that the decision, resolution and determination of said Artesian Hot and Cold Water Company, to go out of business, and to undertake to make plaintiff its successor in its said business, and to all its rights, properties, privileges, franchises, claims and contracts was fraudulent and collusive, and that for the purpose of fraudulently imposing on the jurisdiction of this Court, said Artesian Hot and Cold Water Company did attempt to organize, form and create, under the laws of West Virginia, a corporation out of its own members,

stockholders and officers, to whom it has fraudulently and collusively pretended to turn over, transfer and assign and convey all its properties, business, claims, demands, accounts, rights, privileges, franchises, works and all pertaining thereto, and all claims, rights, contracts connected therewith, and all liens, damages and claims due or owing or claimed to be due or owing to it arising from contract or from torts or trespass or from noncontract sources, including its said pretended claim and every claim against this defendant, and all without any consideration whatever passing to the said Artesian Hot and Cold Water Company therefor, and wholly for the purpose of enabling this plaintiff to institute this suit in the United States Court, all being done long after the right of action, if any exist, had accrued, and said defendant says that said Boise Artesian Hot and Cold Water Comapny is composed of the same persons, stockholders and members, and organized alone for the purpose of giving jurisdiction to this court.

12.

The defendant further answering, says, that the plaintiff should not maintain said suit herein for the reason that more than sixty days have elapsed since the date upon which it is alleged and claimed in plaintiff's complaint, that said Artesian Hot and Cold Water Company turned over and transferred, assigned and conveyed to plaintiff all its properties, business and claims, and its said claims and all claims alleged against this defendant, and that the plaintiff has, at all times, failed and refused, and continues to fail and refuse to file a certified copy of its Articles of Incorporation in the office of the

county recorder of Ada County, in which the property in question is situated.

Wherefore, defendant prays that the plaintiff take nothing by this cause of action; that said action be dismissed, it having been brought contrary to law and without right or claim; for costs and disbursements herein, and for all proper relief.

JOHN J. BLAKE,
C. S. KINGSLEY and
W. E. BORAH,
Attorneys for Defendant.

State of Idaho,
County of Ada. } ss.

M. Alexander, being duly sworn, deposes and says: that he has read the above and foregoing answer; knows the contents thereof, and that the facts therein stated are true, of his own knowledge, except as to matters therein stated to be on information and belief, and as to those matters, he believes it to be true; that he is the duly elected, qualified and acting Mayor of the above-named defendant, and as such verifies this answer.

M. ALEXANDER.

Subscribed and sworn to before me, this 8th day of March, 1902.

[Seal] H. W. DUNTON,
Notary Public.

I, John J. Blake, of counsel for the defendant, hereby certify that the foregoing answer to the complaint is, in my opinion, well founded in law.

JOHN J. BLAKE.

Exhibit "A."

ORDINANCE No. 304.

An ordinance granting authority to the Artesian Hot and Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, to furnish and supply water to Boise City, and the inhabitants thereof, to lay and maintain the pipes of said company in the streets and highways, to operate, carry on and conduct the waterworks and business of said company in said city, and demanding of said company to furnish water free of charge to the full extent of their means to said Boise City for fire purposes, and the sprinkling of the streets of said city.

Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho; and,

Whereas, the Artesian Hot and Cold Water Company is a private corporation, organized, existing and operating under the laws of said State of Idaho, and has been existing and operating as such corporation for a period of more than seven years; and,

Whereas, said Boise City is greatly in need of water to be used for fire purposes and sprinkling of the streets in said city;

Now, therefore, the Mayor and Common Council of Boise City, Idaho, do ordain:

Sec. 1. That the Artesian Hot and Cold Water Company, a corporation, organized and existing under and by virtue of the laws of the State of Idaho and the ordinances of said Boise City, is hereby granted by said Boise City authority and permission to lay and main-

tain the pipes of said company in the streets of said city, to operate, carry on and conduct the business of said company in said city, and to supply water to said city and the inhabitants in the manner and according to the laws of Idaho.

Sec. 2. That demand is hereby made by said Boise City of and from said Artesian Hot and Cold Water Company to furnish free of charge sufficient water to the full extent of the means of said company, for fire purposes and for sprinkling of the streets in said Boise City.

Sec. 3. That the privilege and authority granted by this ordinance shall continue for the same term provided for in the franchise heretofore granted by said city to the predecessors of the said Artesian Hot and Cold Water Company.

Sec. 4. This ordinance shall take effect and be in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 19th day of April, 1900.

Approved by the Mayor of Boise City, Idaho, this 19th day of April, 1900.

J. H. RICHARDS,
Mayor.

Attest: H. I. McELFRESH,
City Clerk.

Exhibit "B."

NOTICE.

To the Artesian Hot and Cold Water Company, a Corporation, Doing Business in Boise City, Idaho:

Gentlemen: You and each of you are hereby notified that Boise City, a municipal corporation of the State

of Idaho, in accordance with ordinance number 304, approved April 19th, 1900, of said Boise City, and the laws of Idaho, hereby makes demand of and from the said Artesian Hot and Cold Water Company to furnish free of charge to said Boise City sufficient water to the full extent of the means of said company for city fire purposes and for sprinkling of the streets in said Boise City, Idaho.

That a copy of said ordinance number 304 is hereby annexed and made a part of this notice.

This notice is given by order of the Council and Mayor pro tem of Boise City, Idaho.

Dated at Boise City, Idaho, April 19th, 1900.

H. N. COFFIN,
Mayor pro tem of Boise City, Idaho.

Attest: H. I. McELFRESH,
City Clerk of Boise City, Idaho.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company vs. Boise City. Answer. Filed March 8th, 1902. A. L. Richardson, Clerk.

Journal Entries.

At a stated term of the Circuit Court of the United States for the Central Division of the District of Idaho, held at Boise in said District on Tuesday, the 6th day of May, A. D. 1902. Present: Honorable HIRAM KNOWLES, Judge.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,
vs.
BOISE CITY.
No. 199.

Trial.

Now, on this day this cause came regularly on to be heard and tried before the court and jury. Messrs. Kingsbury & Kingsbury, and A. A. Fraser, Esqr., appearing as counsel for plaintiff, and John J. Blake, W. E. Borah and C. S. Kingsley, Esqrs., on behalf of defendant.

Agreement Waiving Objection to Jury.

It was agreed in open court by counsel for the respective parties, that no objection would be made to the panel of said jury, upon the ground that said jurors were summoned as a special jury upon an open venire issued to the marshal.

Order Giving Time to File Bill of Exceptions.

It is further agreed and ordered that either party have sixty days from the date of the close of said cause in which to file and serve statement and bill of exceptions in said cause.

Thursday, May 8, 1902.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,
vs.
BOISE CITY.
No. 199.

Trial Concluded and Order that Bill of Exceptions May be Settled in Montana.

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present and the respective attorneys being in court. The examination of B. S. Howe as a witness for plaintiff was resumed, and during whose examination in chief, the said plaintiff upon the ruling of the Court upon objection to the introduction of testimony, rested its case. The defense introduced documentary evidence and rest here.

Thereupon the said jury, under the instructions of the Court, returned the following verdict:

"United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited,
vs.
BOISE CITY.

Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

E. MASTERS,
Foreman."

Which verdict was recorded by the clerk and read to the jury, who confirmed the same; thereupon, the Court discharged said jury from the further consideration of said cause, and ordered that judgment be entered in accordance with said verdict.

It was agreed in open court by counsel for the respective parties, that the bill of exceptions in said cause, may be settled and signed in Montana, with the same force and effect as if signed in Idaho.

In the Circuit Court of the United States, for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited (a Corporation),
Plaintiff,
vs.
BOISE CITY,
Defendant.

Motion to Strike Out.

Comes now the plaintiff and makes severally the following motions:

I.

That of paragraph 26 of defendant's answer to the first cause of action, that portion of the same designated as Subdivision "(A)" be stricken out, as irrelevant and immaterial and not constituting any ground of defense.

II.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26, marked Subdivision

"(B)," on the ground that the same is irrelevant, immaterial, and not constituting any ground of defense.

III.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26, marked Subdivision "(C)," as irrelevant and immaterial, and not constituting any ground of defense.

IV.

Plaintiff also moves as a separate motion to strike out that portion of said paragraph 26 of defendant's answer, marked Subdivision "(D)," on the ground that the same is irrelevant, immaterial, and that the matters stated therein do not constitute a ground of defense.

V.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated Subdivision "(E)," for the reason that the same is irrelevant, immaterial, and does not constitute any ground of defense.

VI.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated as Subdivision "(F)," for the reason that the same is irrelevant and immaterial, and does not constitute any ground of defense.

VII.

Plaintiff also moves to strike out that portion and subdivision of paragraph 26 of defendant's answer, marked and designated Subdivision "(G)," for the rea-

son that the same is irrelevant, immaterial, and that the facts stated therein do not constitute any ground of defense.

VIII.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated Subdivision "(H)," as irrelevant, immaterial, and not constituting any ground of defense.

IX.

Plaintiff also moves to strike out that portion of said paragraph 26 of defendant's answer, marked and designated Subdivision "(I)," as irrelevant, immaterial, and not constituting any ground of defense.

X.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated as Subdivision "(J)," as irrelevant, immaterial, and not constituting any ground of defense.

XI.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated Subdivision "(K)," as irrelevant, immaterial, and not constituting any ground of defense.

XII.

Plaintiff also moves to strike out that portion of said paragraph 26 of defendant's answer marked and designated Subdivision "(L)," for the reason that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XIII.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated as Subdivision "(M)," for the reason that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XIV.

And as a further and separate motion, plaintiff moves to strike out all of said paragraph 26 of defendant's answer on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XV.

Plaintiff also moves as a separate and distinct motion to strike out that portion of the defendant's answer to the second cause of action, marked and designated as Subdivision "(A)," of the 9th allegation of said answer, to the second cause of action, on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XVI.

Plaintiff also moves to strike out that portion of defendant's answer to plaintiff's second cause of action, marked and designated as paragraph "(10)," on the ground that the same is irrelevant and immaterial, and that the matters therein stated do not constitute any grounds of defense.

XVII.

Plaintiff also moves as a further and separate and distinct motion to strike out that portion of defendant's

answer to plaintiff's second cause of action, marked and designated as paragraph "(11)," on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any grounds of defense.

XVIII.

Plaintiff also moves as a separate and distinct motion to strike out that portion of defendant's answer to plaintiff's second cause of action, marked and designated as paragraph "(12)," on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any grounds of defense.

KINGSBURY & KINGSBURY and
ALFRED A. FRASER,
Attorneys for Plaintiff.

[Endorsed]: No. 199. In the Circuit Court of United States, District of Idaho. Boise A. H. & C. W. Co., Plaintiff, vs. Boise City, Defendant. Filed May 6, 1902. A. L. Richardson, Clerk. Kingsbury & Kingsbury, Attorneys for Plaintiff.

United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER CO., Limited,
vs.
BOISE CITY.

Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

C. MARSTERS,
Foreman.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company vs. Boise City. Verdict. Filed May 8th, 1902. A. L. Richardson, Clerk.

In the United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER CO., Limited, Plaintiff

vs.

BOISE CITY, Defendant.

Judgment.

This action came on regularly for trial on the 6th day of May, 1902. The plaintiff appearing by its counsel, Messrs. Kingsbury & Kingsbury and A. A. Fraser, Esq., and the defendant by its counsel, W. E. Borah, J. J. Blake, and Charles S. Kingsley, Esqrs. A jury of twelve persons was regularly impaneled and sworn to try said action; a witness was sworn and examined on behalf of plaintiff, and documentary evidence introduced on behalf of both plaintiff and defendant; thereupon the Court instructed the jury to return a verdict for defendant, and the said jury, without leaving the jury-box, returned the following verdict:

"*United States Circuit Court, Central Division, District of Idaho.*

BOISE ARTESIAN HOT AND COLD WATER CO., Limited,
vs.
BOISE CITY.

Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

E. MARSTERS,
Foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that plaintiff take nothing by its complaint herein, and that said defendant Boise City, do have and recover of and from the Boise Artesian Hot and Cold Water Company, Limited, the said plaintiff, its costs and disbursements herein expended, amounting to the sum of thirty-five and 74-100 dollars.

Dated May 8, 1902.

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company, Limited, vs. Boise City. Judgment. Filed May 8th, 1902. A. L. Richardson, Clerk.

United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER CO., Limited,

vs.

BOISE CITY.

Clerk's Certificate to Judgment-Roll.

I, the undersigned clerk of the United States Circuit Court of the United States, for the District of Idaho, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court this 8th day of May, 1902.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: In the Circuit Court of the United States for the District of Idaho, Central Division. Judgment-Roll. No. 199. Boise Artesian Hot and Cold Water Company vs. Boise City. Register No. 1. Filed May 8th, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY,
Plaintiff,
vs.
THE CITY OF BOISE,
Defendant.

Bill of Exceptions.

Be it remembered that on the 6th day May, 1902, this cause came on for trial in said Court before Honorable H. Knowles, the Judge presiding and a jury. Kingsbury & Kingsbury and Alfred A. Fraser, appearing as counsel for the plaintiff, and W. E. Borah, J. J. Blake and Chas. S. Kingsley, appearing as counsel for the defendant. Whereupon the following proceedings were had, to wit:

Plaintiff offers in evidence the Certificate of Incorporation of the Plaintiff Company, the same is admitted in evidence and read to the jury, and marked Plaintiff's Exhibit "A"; a copy of which is hereto attached and made a part of this bill of exceptions.

Plaintiff offers in evidence a deed purporting to convey certain property and franchises of the Artesian Hot and Cold Water Company to the Boise Artesian Hot and Cold Water Company; said deed is admitted in evidence, read to the jury and marked Plaintiff's Exhibit "B," a copy of which said exhibit is hereto attached and made a part of this bill of exceptions.

Plaintiff now offers in evidence document purporting to transfer certain property, rights of action, debts and other matters from the Artesian Hot and Cold Water Company to the Boise Artesian Hot and Cold Water Company; the same is admitted in evidence, read to the jury, and marked Plaintiff's Exhibit "C," a copy of which said exhibit is hereto atached and made a part of this bill of exceptions. It is here admitted by the defendant that the plaintiff incorporation, has filed with Secretary of State, and with the clerk and recorder of Ada County, a paper designating his proper office and place of business in Idaho, as Boise City, Ada County, and appointing and designating B. S. Howe its agent, upon whom service of process can be made in compliance with the laws and constitution.

B. S. HOWE, called, sworn and examined, testified as follows; I am sixty years of age; I reside in Boise City. I am secretary of the Boise Artesian Hot and Cold Water Company. I have been secretary of the Artesian Hot and Cold Water Company. Am secretary of the plaintiff company since its organization about two years ago. The plaintiff company commenced business on the evening of the 28th of August, 1901—a general water business, distributing and selling water to the people here in Boise City. The plaintiff company has had dealings with Boise City; the plaintiff company has been furnishing water to the people of Boise City since the 28th of August, 1901. The company has rendered bills to the city for water supplied to the city, and the city paid them. I was secretary of the old company, called the Idaho Company; that company ceased to do business at the close of business on the 28th of August, 1901. My

duties as secretary were the same in both companies; next to Mr. Eastman, the management came to me. Mr. Eastman is the general manager, but next to him I performed the duties, consisting of the general supervision of the works throughout the city by our pipe men, and managing and taking charge of the Natatorium and pump station, and, in a general way, overlooking the whole system, including the reservoirs, wells, etc., I am well acquainted with the properties of this company. The waters of the company are developed by artesian wells. We have flowing and abandoned wells, all told, twenty-nine, all but one artesian wells; eight or nine of them have ceased to flow: Three of the wells are hot water wells, which are situated some distance from the cold water wells. I have charge of the collecting and rendering of the bills of the company, etc. I know what claim the first cause of action set forth in the complaint is for; nothing has been paid on it; I also know in regard to the claim set forth in the second cause of action in the complaint.

Q. Has anything been paid for water taken for sprinkling purposes by the city that was taken since August 28th, 1901?

(Objected to by the defendant for the reason that it is irrelevant and immaterial, for the reason that if it was taken for sprinkling purposes, there could be no charge made for it by the plaintiff.)

The COURT.—The objection in this matter will be sustained; to which ruling of the Court counsel for plaintiff excepts, and which exception was then and there by the Court allowed.

I know the method by which the city has taken water

during the times mentioned in the complaint from the waterworks company; it was taken by attaching stand-pipes to the fire hydrant partly, and partly by opening our valves and taking it from our stand-pipes. The company never gave them permission to take the water and the company always objected to it. There was a notice served upon the city sometime about the 21st of November, 1901; there has been several notices served upon the city by the company in regard to this matter. (Plaintiff offers in evidence notice served on the city objecting to the taking of water by city for sprinkling purposes. Paper admitted in evidence, read to the jury and marked Plaintiff's Exhibit "D," a copy of which exhibit is hereto attached and made a part of this bill of exceptions.) This paper, exhibit "D," is one of the notices. (Plaintiff offers to introduce in evidence paper, being notice to the defendant, not to take water from the company's waterworks system for the purpose of sprinkling the streets; same is admitted in evidence, read to the jury and marked Plaintiff's Exhibit "E," a copy of which exhibit is hereto attached and made a part of this bill of exceptions.) After the plaintiff company was formed, or rather, after it purchased the properties about the 28th of August, an advertisement was put in all the papers of Boise, a notice signed by each company, the one going out and the one coming in. I have a copy of the paper. (Papers offered in evidence, admitted and read to the jury and marked Plaintiff's Exhibit "F" and "G"; copies of each said exhibits are hereto attached and made a part of this bill of exceptions.) Copies of exhibits "F" and "G" were published in all four papers of Boise City on the 29th and 30th of August, 1901, at the

time the new company took the property and commenced business, I remember of serving upon the mayor of the city, immediately after receiving notice, of the passage of the ordinance 304, the purport of which was, that the company refused to accept the ordinance; that it did not need the pretended grant or franchise it contained, and that it considered the same as illegal and void, or of similar purport.

As to the ability and power of furnishing water by the Artesian Hot and Cold Water Company, during the year 1901, our gravity supplies was 104,000,000 gallons a year, and all the rest we had to pump; all that was furnished beyond that amount had to be pumped from wells. Our gravity flow was sufficient outside of lawn sprinkling in summer, to furnish out customers for domestic purposes; taking in the lawn, it was not sufficient during the summer months. Provided no water had been used for sprinkling in the summer months of 1901, it would have required on an average, 400,000 gallons a day to be pumped. On account of the water taken by the city for sprinkling purposes it would make a difference of about five hours a day of pumping during the sprinkling season. In 1900, I can't exactly tell, but it required about ten per cent less extra pumping for sprinkling during that season. All the cold water that was used for sprinkling the streets was obtained by pumping. The power that runs our pump is steam-power; we use coal for fuel. It took about five hours more pumping last year every day to supply the water that was used for sprinkling the streets. The cost of the water system of the company up to the present time has been about $335,000 or $340,000. The absolute cost

of the cold water system, including real-estate, tools, etc., was about $212,000, or $240,000.

Q. I will ask you, if, during the time alleged in the complaint, in which it is alleged that the defendant took this water, if the cold water system was paying dividends or producing a profit?

(Objected to by counsel for the defendant as incompetent, irrelevant and immaterial, for the reason that it would be simply a question of fixing the rates under the statutes as to whether it was paying or not, which objection was sustained by the Court; to which action of the Court plaintiff excepted, which exception was by the Court at the time allowed.)

Plaintiff rests.

Defendant offered in evidence the articles of incorporation of the Artesian Hot and Cold Water Company, and the same were admitted in evidence and read to the jury and marked Defendant's Exhibit No. "1," and made a part of this bill of exceptions.

The Court, of its own motion, instructed the jury as follows:

Gentlemen of the Jury: You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant; to which action of the Court, counsel for the plaintiff excepted on the ground that the instruction was against the law and the evidence, and not proper under the evidence and the admissions of the pleadings (which exception was by the Court then and there allowed).

Case closed.

Thereafter, to wit, May 8th, 1902, judgment was regularly entered herein in favor of the defendant for costs of suit and against the plaintiff (to which judgment the plaintiff duly excepted).

The foregoing together with the exhibits therein mentioned and hereto attached constitutes and contains the evidence, and all the evidence, given at the trial of this action.

By stipulation of counsel, and by order of the Court duly made and entered at the trial, it was agreed and ordered that the bill of exceptions might be settled in the State of Montana, and sixty days' extra time was given by agreement of counsel and by order of the Court in which to prepare and serve bill of exceptions.

Plaintiff's Exhibit "A."

STATE OF WEST VIRGINIA.

CERTIFICATE OF INCORPORATION.

I, Wm. M. O. Dawson, Secretary of the State of West Virginia, do hereby certify that an agreement duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

The undersigned agree to become a corporation by the name of

"BOISE ARTESIAN HOT AND COLD WATER COMPANY"

for the purpose of acquiring, developing and holding springs, wells and streams of both hot and cold water and conducting the waters thereof to reservoirs and to Boise City and to the vicinity of Boise City in Ada

County, State of Idaho, for the use of said city and the inhabitants thereof, and the inhabitants of Ada County, in and in the vicinity of said city; of furnishing waters for municpal, for county, for State, for fire, for sanitary, for baths, for domestic, for heating, for mechanical, and for other useful and beneficial purposes; of supplying the same to the inhabitants of Ada County, State of Idaho, in the vicinity of Boise City, and to the inhabitants of Boise City, and to said city, county and State for such and other purposes; of furnishing steam and water for heating, for motive power, and for mechanical and other useful purposes; of erecting, constructing, holding, using, managing and maintaining sanitariums and natatoriums, hotels, baths, bath-houses and all other necessary or convenient buildings, at and near said Boise City; of developing, erecting, constructing, operating, holding, using, managing and maintaining artesian wells, reservoirs, pipe lines and tramways; also of acquiring, holding, using, selling and transferring real estate and all such rights of way, franchises, waters, artesian wells, reservoirs, pipe lines, water rights, water-powers, machinery, appliances and other rights and properties as may be necessary, suitable or convenient in successfully conducting the business of the corporation. Of charging, collecting, and receiving tolls, rents and rates for all services performed or benefits rendered; of taking, purchasing, acquiring, holding, operating and maintaining the rights and properties of water companies, associations or corporations and of acquiring, using owning and operating all the properties, franchises, rights claims, privileges and everything pertaining to that certain corporation of the State of Idaho, known as "The

Artesian Hot and Cold Water Company, Limited," and to be the successor in every respect of said corporation.

Which corporation shall keep its principal office or place of business at the city of Boise, in Ada County, State of Idaho, and is to expire on the first day of September, A. D. 1950. And for the purpose of forming the said corporation, we have subscribed the sum of fifty-five thousand seven hundred dollars to the capital thereof, and have paid in on said subscription, the sum of five thousand five hundred and seventy dollars; and desire the privilege of increasing the said capital, by the sale of additional shares from time to time to two hundred and fifty thousand dollars in all.

The capital so subscribed is divided into shares of one hundred dollars each, which are held by the undersigned respectively, as follows, that is to say:

Names.	Residence.	No. of shares.
Hosea B. Eastman,	Boise City, Idaho.	230
C. W. Moore,	Boise City, Idaho.	105
Charles Himrod,	Boise City, Idaho.	27
J. W. Cunningham,	Boise City, Idaho.	50
Alfred Eoff,	Boise City, Idaho.	145

And the capital to be hereafter sold is to be divided into shares of like amount.

Given under our hands this 27th day of August, A. D. 1900.

H. B. EASTMAN.
C. W. MOORE.
CHARLES HIMROD.
ALFRED EOFF.
J. W. CUNNINGHAM.

Wherefore, the corporators named in the said agreement and who have signed the same, and their successors and assigns, are hereby declared to be from this date until the first day of September, nineteen hundred and fifty, a corporation by the name and for the purpose set forth in said agreement.

Given under my hand and the Great Seal of said State, at the city of Charleston, this first day of September, nineteen hundred.

[Seal] WM. M. O. DAWSON.
Secretary of State.

Plaintiff's Exhibit "B."

This indenture, made this 28th day of August, A. D. 1901, by and between the Artesian Hot and Cold Water Company, Limited, a corporation duly organized and existing under the laws of the State of Idaho, whose principal place of business is in the city of Boise, Ada County, Idaho, party of the first part, and the Boise Artesian Hot and Cold Water Company, Limited, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, whose principal place of business is in the city of Boise City, Ada County, Idaho; and whereas, both the stockholders, at a meeting duly called and assembled, and the Board of Directors of said Artesian Hot and Cold Water Company, Limited, duly assembled, duly passed the necessary resolutions empowering the execution of this deed on the part of the said company by the president and secretary of said company; and whereas, C. W. Moore is the president of said Artesian Hot and Cold Water Company, Limited, and B. S. Howe is the secretary of said com-

pany; and whereas, the party of the second part, the said Boise Artesian Hot and Cold Water Company, Limited, both by its stockholders duly called and assembled and by its Board of Directors duly assembled, passed the necessary resolution empowering the officers of said company to enter into the necessary contracts for purchasing the properties mentioned herein:

Now, therefore, in pursuance of said resolutions of said stockholders and of said Board of Directors of said Artesian Hot and Cold Water Company, Limited, aforesaid, and in consideration of the performance on the part of the party of the second part of all the necessary requirements of said resolutions on its part required, and of one dollar in hand paid, the receipt of which and all of which consideration is hereby acknowledged, the said party of the first part doth by these presents grant, bargain, sell, assign, convey, confirm, transfer, remise, release and deed unto the said party of the second part, its successors and assigns forever, all its right, title, interest, claim and demand whatsoever, in law or equity, of, in or to, the following rights, lands, privileges and properties, to wit:

The following described real estate and properties in Ada County, State of Idaho, to wit: The northeast quarter (¼) of the southeast quarter (¼) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the northeast half (½) of the southeast quarter (¼) of section thirty-four (34) and the northwest quarter (¼) of the southwest quarter (¼) and the southwest quarter (¼) of the northwest quarter (¼) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the southeast quarter (¼) of the northwest quarter

(¼) and the south half (½) of the northeast quarter (¼) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the following parcel of land situate on the Warm Springs Avenue in said Ada County, to wit: Beginning on the south side of the public road leading from Boise City to the Warm Springs and known as the Warm Springs road, at a point on the section line between sections thirteen (13) and fourteen (14), in town. three (3) north, range two (2) east, Boise Meridian, and running thence easterly along the south side of said road one hundred and twenty (120) feet, thence at right angles in a southwesterly direction to the same section line; thence north to the place of beginning; also the southeast quarter (¼) of the southeast quarter (¼) of the southwest quarter (¼) of section twelve (12), town. three (3) north, range two (2) east, Boise Meridian, containing ten acres of land; also that piece of land bounded as follows: Commencing at a point in the center of the Warm Springs road, leading from Boise City to the Warm Springs, at the southeast corner of I. N. Coston's land, which point is situate seven (7) chains and fifty (50) links south of the southeast corner of section eleven (11), town. three (3) north, range two (2) east, Boise Meridian; and running thence south thirteen (13) and forty-six hundredths (46-100) chains; thence west three (3) and sixty-one-hundredths (60-100) chains; thence north four (4) and twenty-eight one-hundredths (28-100) chains to the water ditch known as the Jacobs Mill Ditch; thence north seventy-two (72) degrees west, along said ditch four (4) and sixty eight one-hundredths (68-100) chains to the center of the headgate in said ditch; thence north eleven (11) degrees west six

(6) and fifty one-hundredths (50-100) chains to a post; thence north forty-two (42) degrees and thirty (30) minutes east two (2) and fifty one-hundredths (50-100) chains; thence north thirty (30) degrees and thirty-six (36) minutes east five (5) and ninety-eight one-hundredths (98-100) chains to the center of the Warm Springs Road; thence south fifty-nine (59) degrees and twenty-four (24) minutes east four (4) and eighty-seven one-hundredths (87-100) chains to the place of beginning, containing nine (9) and seven one-hundredths (7-100) acres of land, more or less, in section fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; also that certain right of way through, along and under the lands of Robert B. Wilson, for water pipes of the Artesian Hot and Cold Water Company, Limited, and more particularly described as follows, to wit: Beginning at a point located as follows, running from a point north fifty-four (54) degrees and seven (7) minutes west from the north quarter-section corner of section thirteen (13), town. three (3) north, range two (2) east, Boise Meridian, two hundred and forty-nine (249) and seven-tenths (7-10) feet distant, which point is situate one hundred and seventy-three (173) and five-tenths (5-10) feet from the westerly artesian hot water well of the Artesian Hot and Cold Water Company, Limited; and running thence south seventy-two (72) degrees and ten (10) minutes west, twelve hundred (1200) feet to said point of beginning of said right of way situate on that east line of the land of the said Robert B. Wilson, and from said point of beginning running south seventy-two (72) degrees and ten (10) minutes west fourteen hundred and eleven (1411) feet to the west line of the land of the said Wilson at

a point one hundred and ninety-six (196) feet south of the south side of the public road leading from Boise City up the Boise River to the Warm Springs, and known as the Warm Springs road, situate in Ada County, State of Idaho, with full and free right and liberty for the said Artesian Hot and Cold Water Company, its successors and assigns, and its and their agents and servants, to dig and upon said right and place, lay and put its and their water pipes therein and thereupon and remove, replace and repair the same with ingress and egress therefor, and the right to go, return, pass and repass with the necessary horses, carts, wagons and tools through, along and over said right of way from time to time and at all times hereafter in laying, removing, replacing and repairing said water pipes, granted and conveyed to the said Artesian Hot and Cold Water Company, Limited, by a warranty deed dated May 16th, 1891, given by Robert B. Wilson and Louisa B. Wilson, his wife, and recorded in book 18 of Deeds, at page 45, of the records of said Ada County; also lots five (5) and six (6) in block one hundred and seven (107) as same are designated on official plat of Boise City; also that piece or parcel of land in said Ada County, commencing at a point south thirteen hundred and eighty-three (1383) and thirty-six one-hundredths (36-100) feet, and west two hundred and thirty-seven (237) and six-tenths (6-10) feet from the corner to sections eleven (11), twelve (12), thirteen (13) and fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; thence west six hundred and forty-four (644) and two-tenths (2-10) feet; thence north thirty degrees and thirty-six (36) minutes east six hundred and thirty-six (636) and five-tenths (5-10)

feet; thence south eleven (11) degrees east one hundred and fifty (150) feet; thence south seventy-two (72) degrees east three hundred and twenty (320) feet; thence south three hundred (300) feet to place of beginning in the northeast quarter (¼) of section fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; also all hot and cold water pipes and pipe lines and all connected therewith belonging to the party of the first part; also that certain grant and franchise and all rights and privileges pertaining thereto, which was by ordinance of Boise City granted to H. B. Eastman and B. M. Eastman, and all pertaining to the waterworks once owned by said Eastmans; also that certain water right and the waters flowing from three (3) artesian wells and to each and every of said wells to the extent of four and two hundred and seventy-three one-thousandths cubic feet per second of time, which said wells through and by means of which said water is diverted and appropriated and situated in the southeast quarter of the southeast quarter of the southwest quarter of section twelve (12), town. three (3) north, range two (2) east, of the Boise Meridian, in Ada County, State of Idaho, located by party of first part November 23d, 1899, and notice of location filed in office of recorder of Ada County on November 24th, 1899, and recorded in book 2 of Water Rights, at page 583; also that certain water right and the waters flowing from three artesian wells and each and every of said wells to the extent of four and two hundred and seventy-three one-thousandths cubic feet per second of time, which said wells through and by means of which said water is diverted and appropriated, are situated in the southeast quarter (¼) of the south-

east quarter (¼) of the southwest quarter (¼) of section twelve (12), town. three (3) north, range two (2), east of Boise Meridian, in Ada County, State of Idaho, which said water right and waters were on the 24th day of November, 1899, located by the party of the first part, and notices of which location was filed for record in the office of the recorder of Ada County, on the 25th day of November, 1899, and recorded in book two, of water rights in said office at page 584; together with all and singular the tenements, hereditaments, rights, privileges and appurtenances thereunto belonging, or in any way appertaining, and the revision or revisions, remainder or remainders, rents, issues, benefits, rates and profits thereof.

To have and to hold, all and singular, the said premises, rights, privileges, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part, by resolution of its Board of Directors, hath caused these presents to be subscribed by its president and secretary, and its corporate name and seal to be hereunto affixed, the day and year first above written.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[Seals] By C. W. MOORE,
President, and
B. S. HOWE,
Secretary.

($10.)
(I. R. Stamps) ($10. I. R. S.)
($10. I. R. S.) ($10. I. R. S.) ($10. I. R. S.) ($10. I. R. S.)
($10. I. R. S.) ($5. I. R. S.)

State of Idaho, }
County of Ada. } ss.

On this 28th day of August, 1901, before me, W. S. Bruce, a notary public in and for Ada County, personally appeared C. W. Moore, personally known to me to be the president of the Artesian Hot and Cold Water Company, Limited, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] W. S. BRUCE,
Notary Public.

Plaintiff's Exhibit "C."

Know all men by these presents, that the Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and whose principal place of business is at Boise City, Idaho, the party of the first part for and in consideration of value received to it in hand paid by the Boise Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and whose principal place of business is at Boise City, Idaho, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, assign, turn over and convey unto the said party of the second part, its successors and assigns, the grant of franchise to lay pipes in the streets and alleys of Boise City, in Ada County,

Idaho, and to furnish the residents of said city with water for a consideration, being by ordinance of said Boise City duly passed and granted to H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks on October 3d, 1899, together with all rights and privileges belonging thereto, or in any manner connected therewith, or incident or belonging to or with said franchise; also all claims, debts and moneys due, or to become due, to the party of the first part, both those arising ex contractu and those arising ex delicto of every nature, class and kind whatsoever; also the benefits, rights and advantage and right and privilege of being substituted in, to or under all contracts, both executed or executory, made by and between said party of the first part and its customers and patrons in its business of carrying on waterworks hot and cold; also the claims and demands it has against said Boise City of every kind and nature and description; also all the tools, supplies, pipes, furniture, fixtures, material, notes, accounts, bills receivable, choses in action, claims for damages, all and singular, and all the personal property of every nature and kind which it has or owns and which it has used in or pertaining to or with its property, franchise, rights and waterworks which it has owned and operated as the successor of said Eastmans in interest in their waterworks; also all and particularly the claim of party of the first part against Boise City for taking and consuming water of party of first part in the sprinkling of its streets in the years 1900 and 1901; also the claim for balance due on contract for 1899 for water for street sprinkling, the same being $100.00 and interest on same amounting to $16.00 to have and to hold, to own

and possess the same to the said party of the second part and its successors and assigns forever.

In witness whereof, the said Artesian Hot and Cold Water Company, Limited, has hereunto set its name and seal by the hand of its president and secretary in accordance with a resolution of its stockholders and of its Board of Directors this 28th day of August, 1901.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[Seal] By C. W. MOORE,
President, and
B. S. HOWE,
Secretary.

Plaintiff's Exhibit "D."

To the Honorable Mayor and Common Council of Boise City, Idaho, and to Boise City:

Sirs: You are hereby notified not to take water from the waters or waterworks or water pipes of the undersigned for the purpose of sprinkling upon roads, streets or alleys, and you are to discontinue such acts, and that such acts are and have been regarded as trespasses and as wrongful, unnecessary and in disregard of the rights of this company. You are also notified not to take or use any of the waters of this company for any purpose without first making promise and arrangement to pay for the same a fair remuneration.

And the undersigned forbids the meddling with its waterworks, properties, the taking of its water for street sprinkling purposes under or by virtue of Ordinance No. 304 or at all without promise first made to pay for the same, and you are requested to repeal ordinance demand-

ing free water numbered 304, and you are again informed that the undersigned regards the same as illegal and void, and that the enforcing the same is a trespass on the rights and properties of the undersigned and a great damage to this company.

Boise, Idaho, November 21st, 1901.

Respectfully submitted,

C. W. MOORE,
President.

Attest: B. S. HOWE,
Secretary.

Plaintiff's Exhibit "E."

To the Mayor and Common Council of the City of Boise City, Idaho, and to Boise City:

Gentlemen: The undersigned, the Boise Artesian Hot and Cold Water Company (Limited), a corporation of the State of West Virginia, and the successor in interest in the waterworks and all pertaining thereto (by reason of its successorship to the properties and rights of H. B. Eastman and B. M. Eastman in their waterworks), of the Artesian Hot and Cold Water Company, Limited, a corporation of the State of Idaho, hereby notifies you that it cannot afford to furnish water for the use of its waterworks to the said city or to any person without compensation, that it is willing to furnish water for all purposes at a reasonable compensation, that under city Ordinance No. 304, the city has been by force and by

virtue of its police power and police force taking water from said works against the wishes and protests of the owners of said waterworks.

The undersigned requests the repeal of said ordinance and objects to the city longer enforcing the same, and objects to the city's meddling with its waters or its pipes or any of its properties; the undersigned has assumed and will perform all the duties and obligations of its said predecessors in interest in the said waterworks and in the rights and privileges pertaining thereto, as successor of the said Eastmans.

The undersigned gives notice that the city must immediately cease to and desist from meddling with, using, taking or consuming its waters or its waterworks or properties or any of them for street sprinkling, or for any other purpose, until action is taken looking to payment or the providing for payment for same.

The city is forbidden to use the stand-pipes owned by the undersigned and connected with its waterworks; the city is forbidden to take water out of the waterworks or pipes of the undersigned by means of said stand-pipes, or by any way or manner for street sprinkling.

The undersigned respectfully but firmly requests and orders the city not to trespass upon its property, not to meddle with it, and not to take water from its said waterworks system without compensation or the promise of compensation.

The present conduct of the city is regarded as a tres-

pass continued and enforced by the police of the city and if longer practiced by the city, the undersigned will attempt to find adequate resistance or appropriate remedy.

Dated September 18th, 1901.

Very respectfully,

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED.

[Seal] By C. W. MOORE,
President.

B. S. HOWE,
Secretary.

Plaintiff's Exhibit "F."

NOTICE.

To the General Public and particularly to all who have been our patrons and customers:

Please take notice that the Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of Idaho, with principal place of business at Boise City, Idaho, has sold, transferred and turned over its water systems, claims, choses in action, bills of accounts and business to the Boise Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, with its principal place of business at Boise City, Idaho, which corporation of West Virginia will enter upon and conduct the business of a water company as heretofore conducted by said Artesian Hot and Cold Water Company, Limited, a corporation of Idaho. The closing up of the business of said Idaho corporation can

be transacted with B. S. Howe, its secretary, at his office, in Boise City.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

By B. S. HOWE,
Secretary.

Plaintiff's Exhibit "G."

NOTICE.

To the General Public and to all persons in, and in the Vicinity of Boise City, in Ada County, Idaho:

Please take notice that the undersigned, as successor in interest of the waterworks of H. B. Eastman and B. M. Eastman, and so far of the corporations which were their successors in interest in the waterworks formerly owned by them, will continue and carry on the business of a water company for compensation and solicits your friendly patronage; that it will at same rates continue said business of furnishing water to the people of Ada County in and in the vicinity of Boise City, who reside or have places of business upon its pipe lines; that its principal office and place of business is in the Boise City National Bank Building on Idaho street, in Boise City.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

By C. W. MOORE,
President.

And B. S. HOWE,
Secretary.

Defendant's Exhibit No. 1.

ARTICLES OF INCORPORATION

of the

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED.

Know all men by these presents, that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Idaho.

And we hereby certify:

First. That the name of said corporation is the Artesian Hot and Cold Water Company, Limited.

Second. The purposes for which it is formed are; to acquire, develop and hold springs, wells and streams of both hot and cold water and conduct the waters thereof to Boise City and vicinity in Ada County, State of Idaho, for the use of said city and the inhabitants thereof; to furnish such waters for municipal, fire, sanitary, domestic, heating, mechanical and other useful and beneficial purposes, and to supply the same to the inhabitants of said Boise City and vicinity for said purposes; to furnish steam for heating, motive power and mechanical purposes; to erect, construct, hold, use, manage and maintain sanitariums, hotels, baths, bath-houses, and all other necessary or convenient buildings at or near said Boise City; to develop, erect, construct, operate, hold, use, manage and maintain artesian wells, reservoirs, pipe lines and tramways.

Also to acquire, hold, use, sell and transfer real estate and all such rights of way, franchises, waters, as

tesian wells, reservoirs, pipe lines, water rights, water powers, machinery, appliances and other rights and property as may be necessary, suitable or convenient to successfully conduct the business of the corporation, and to charge, collect and receive tolls, rents and rates for all services performed or benefits rendered.

Third. That the place where the principal business of said corporation is to be transacted, shall be Boise City, in Ada County, State of Idaho.

Fourth. That the term for which said corporation is to exist, is fifty years from and after the date of its incorporation.

Fifth. That the number of its directors shall be eleven (11) and that the names and residences of those who are appointed for the first year are:

Hosea B. Eastman,	Boise City, Idaho.
Christopher W. Moore,	Boise City, Idaho.
Alfred Eoff,	Boise City, Idaho.
Timothy Regan,	Boise City, Idaho.
Peter Sonna,	Boise City, Idaho.
William H. Ridenbaugh,	Boise City, Idaho.
Nathan Falk,	Boise City, Idaho.
William N. Northrop,	Boise City, Idaho.
Thomas David,	Boise City, Idaho.
John Lemp,	Boise City, Idaho.
Joseph R. De Lamar,	Delamar, Idaho.

Sixth. That the amount of the capital stock of this corporation shall be two hundred and fifty thousand dollars, divided into two thousand five hundred shares (2,500) of the par value of one hundred (100) dollars each.

Seventh. That the amount of said capital stock which

has actually been subscribed is one hundred and thirty-seven thousand five hundred dollars, and the following are the names of the persons by whom the same has been subscribed.

Names of Subscribers.	No. of Shares.	Amount.
Hosea B. Eastman.	445	$45,500.00
Timothy Regan.	70	7,000.00
Christopher W. Moore.	70	7,000.00
Wm. H. Ridenbaugh.	70	7,000.00
George L. Shoup.	50	5,000.00
Richard Z. Johnson	35	3,500.00
George Ainslie	70	7,000.00
Alfred Eoff	10	1,000.00
Peter Sonna	50	5,000.00
Joseph R. De Lamar	100	10,000.00
Nathan Falk	50	5,000.00
Frank R. Coffin	72	7,200.00
L. Weil	10	1,000.00
David Heron	50	5,000.00
Thomas Davis	20	2,000.00
Sigmund Falk	20	2,000.00
A. G. Redway	10	1,000.00
N. S. Hubbell	10	1,000.00
David Falk	15	1,500.00
William N. Northrop	10	1,000.00
Geo. F. Redway	5	500.00
George Collister	10	1,000.00
George D. Ellis	20	2,000.00
J. Brumback	5	500.00
John Krall	10	1,000.00
Charles Himrod	5	500.00

John Brodbeck	5	500.00
John Lemp	10	1,000.00
James McIntyre	5	500.00
Dwight Arnold	25	2,500.00
S. H. Hays	10	1,000.00
Frank A. Nourse	4	400.00
James H. Bush	5	500.00
James B. Milne	1	100.00
N. H. Millard	3	300.00
Robert Wilson	5	500.00
C. Ellsworth	1	100.00
D. F. Baker	1	100.00
S. B. Mann	1	100.00
Chas. A. Clark	1	100.00
Julius Steinmeier	10	1,000.00
F. Dangel	4	400.00
Thos. J. Groome	10	1,000.00
Wm. Stark	5	500.00
John Case	5	500.00
S. Kaiser	2	200.00
T. C. Maupin	2	200.00
G. E. Gregory	2	200.00
Wm. Simpson	5	500.00
J. R. Bennett	1	100.00

In witness whereof, we have hereunto set our hands and seals this 27th day of March, A. D. 1891.

HOSEA B. EASTMAN,	[Seal]
CHRISTOPHER W. MOORE,	[Seal]
ALFRED EOFF	[Seal]
T. REGAN,	[Seal]
PETER SONNA,	[Seal]
WM. H. RIDENBAUGH,	[Seal]
NATHAN FALK,	[Seal]
WM. NORTHROP,	[Seal]
THOS. DAVIS,	[Seal]
JOHN LEMP,	[Seal]
J. R. De LAMAR.	[Seal]

Signed and sealed and delivered in the presence of:

CHAS. A. CLARK.

State of Idaho, } ss.
County of Ada. }

On this 27th day of March, in the year 1891, before me, Chas, A. Clark, a notary public in and for said county, personally appeared Hosea B. Eastman, Christopher W. Moore, Alfred Eoff, T. Regan, Peter Sonna, Wm. H. Ridenbaugh, Nathan Falk, Wm. Northrop, Thos. Davis, John Lemp, and J. R. DeLamar, known to me to be the persons whose names are subscribed to the annexed instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate first above written.

[Seal]

CHAS. A. CLARK,
Notary Public.

State of Idaho, }
County of Ada. } ss.

I, James Wickersham, ex-officio recorder in and for Ada County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the Articles of Incorporation of the Artesian Hot and Cold Water Company, Limited, numbered 118, as the same appears on the files of this office.

In testimony whereof, I have hereunto set my hand and official seal this 7th day of January, 1902.

[Seal] J. H. WICKERSHAM,
Ex-Officio Recorder.

SPECIFICATIONS OF ERROR.

Plaintiff specifies the following as errors made by the Court, and will urge the same as grounds why the judgment should be reversed:

I.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. Has anything been paid for water for sprinkling purposes by the city that was taken since August 28, 1901?" and erred in not allowing the witness to answer such question.

II.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. I will ask you if during the time alleged in the complaint in which it is alleged the defendant took this water, if the cold water system was paying dividends or produc-

ing a profit?" and erred in not allowing the witness to answer this question.

III.

The Court erred in directing the jury to bring in a verdict for defendant, and erred in giving the jury the instruction in the words following: "You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant."

THE VERDICT NOT SUSTAINED BY THE EVIDENCE.

Plaintiff also excepts to the verdict of the jury on the ground that it was not sustained by the evidence, and is contrary to the evidence, and specifies the following particulars in which the verdict is not sustained by the evidence, and is against the evidence: First, the evidence showed that the plantiff was entitled to recover: Second, the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence and admissions of the answer that the plaintiff was a corporation as alleged in the complaint, and was the successor in interest of the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and that at the time of bringing the action it was the owner of the claim set forth in the complaint; that the evidence showed the taking of the water as alleged, by the city, and the value of the same is admitted by the answer, and that what was taken prior to August 28th, 1901, as stated in the first cause of action, had not been paid for.

That the verdict was not sustained by the evidence also for the reason that the evidence showed the corpor-

ate existence of the plaintiff, the transfer to the plaintiff by the Artesian Hot and Cold Water Company of all its properties, together with the claim and all claims against the city, and shows that plaintiff was entitled to recover for water taken from said system of waterworks outside the limits of said city to the amount of 1,000,000 gallons of the value of $125.00.

And that the verdict is contrary to the evidence in this, that the evidence shows, together with the admissions of the answer, that the defendant city in the year 1900, took from the said hot waterworks system water of the value of $1,234.27, and has never paid for the same, refuses to pay for the same, and that the plaintiff was and is the owner of the said claim.

And that the verdict is not sustained by the evidence in that it is shown by the evidence and the admissions of the answer that in the year 1900 the city took from the said cold water system water to the value of $4,936.98, and has never paid anything therefor, and refuses to pay therefor, and that plaintiff is and was the owner of the claim for the value of the same.

And that the verdict is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence under the pleadings that in the year 1901, prior to August 28th of that year, the said city took water from the said hot waterworks system to the value of $826.00, and has paid nothing for the same, and refuses to pay for the same, and that the plaintiff at the time of bringing this action was and is now the owner of this claim for the same.

And that the verdict is not sustained by the evidence and is against the evidence also in this, that it appears

from the evidence and the pleadings that in the year 1901, and prior to August 28th of that year, the said defendant city took from the said cold water system water to the value of $3,312.00 for street sprinkling purposes, and has not paid anything therefor, and that the plaintiff is the owner of the claim for the payment of the same, and was such owner at the time of bringing this action.

And that the verdict is not sustained by the evidence and is contrary to the evidence also in this, that it appears by the evidence and the admissions of the answer that the plaintiff is a corporation as alleged, doing business in Idaho, is successor in interest in the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and its predecessors in interest, and is the owner of all claims against the city once owned, claimed, or held, by the said Artesian Hot and Cold Water Company, Limited, and was such owner, and has been such successor since the 28th day of August, 1901; and that of the waters taken, belonging to the said Artesian Hot and Cold Water Company, Limited, in the years 1900 and 1901 by the said city, and not paid for, and for which the said city refuses to pay anything, and which were used for street sprinkling purposes by the said city, water of the value of $7,500 was so taken by the city and used for sprinkling its streets in front of the lots and properties of other private parties abutting on streets and portions of streets sprinkled.

And that the verdict is contrary to the evidence and not sustained by the evidence in this also, that the evidence shows that plaintiff is a corporation doing business in Idaho, as alleged in the complaint, and was at the

time of bringing this action the successor of the said Artesian Hot and Cold Water Company, Limited, in interest in the said waterworks, and owned the said claim sued upon, and that in the years 1900 and 1901, and prior to August 28th, 1901, the said city took water from the said waterworks system and used the same in sprinkling the streets in front of the blocks of said city, and in the parts of said city where the inhabitants thereof were supplied with water not by the said Artesian Hot and Cold Water Company, Limited, but by Peter Sonna, and from a different and distinct system of waterworks, and for such purposes and uses the said city took large amounts of water to the great damage of the said Artesian Hot and Cold Water Company.

And that the verdict is not sustained by the evidence and is against the evidence in that from the evidence and the admissions of the answer, it appears that the plaintiff is a corporation, as alleged in the complaint, doing business in Idaho as the successor of the said Artesian Hot and Cold Water Company, and has been such successor and was doing business since the 28th day of August, 1901, and is the owner of the waterworks mentioned and in possession of the same, and carrying on the same since last mentioned date; and that the defendant, between the 28th of August, 1901, and January 1st, 1902, took, without permission, and against the protest and objection of plaintiff, 25,480,000 gallons of water belonging to the plaintiff and used the same in sprinkling it upon the streets of the city, and that the water was of the value of $3,160.00; and that it used upon its streets and for sprinkling such parts thereof as were in front of lots owned by other and private persons, waters

of the value of $2,300.00, and that of the waters so taken, waters of the value of $900.00 were taken and used by the defendant upon its streets for sprinkling the same in blocks of said city, and portions of said city where the said Peter Sonna furnishes the inhabitants thereof from his waterworks system, and where the inhabitants are not furnished with water from plaintiff's waterworks system, and that the said waters were taken by the said city against the objection and protest of the plaintiff, and under a claim made by the said city that the waters were free, and that it did not have to pay for the same.

That the verdict is not sustained by the evidence, and is contrary to the evidence and the admissions of the answer also in this, that it was shown to have been beyond the extent of the means of the plaintiff and of its said immediate predecessor to furnish water for purpose of street sprinkling to the extent taken by defendant.

The above and foregoing bill of exceptions is hereby presented for settlement by counsel of the plaintiff as their bill of exceptions in said cause.

KINGSBURY & KINGSBURY, and
ALFRED A. FRASER,
Counsel for Plaintiff.

Now, that the foregoing matters may be made a part of the record, the undersigned Judge of the District Court of the United States, for the District of Montana, and the Judge who tried said cause, at the request of the plaintiff, doth hereby allow, settle and sign, within the time allowed by law, and the order of the undersigned,

the foregoing bill of exceptions and order the same to be filed.

Dated June 17, 1902,

HIRAM KNOWLES,
District Judge.

[Endorsed]: No. 199. Circuit Court, United States, District of Idaho. Boise Artesian Hot and Cold Water Co., Plaintiff, vs. Boise City, Defendant. Bill of Exceptions. Filed June 12, 1902. A. L. Richardson, Clerk. Refiled June 21, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Plaintiff,

vs.

BOISE CITY,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by its attorneys, and complains that in the record and proceedings had in said cause, and in the verdict, and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court, Ninth Circuit, District of Idaho, Central Division, at March term thereof, A. D. 1902, against said plaintiff, on the 8th day of May, 1902,

manifest error hath happened to the great damage of said plaintiff.

Wherefore, said plaintiff prays for the allowance of a writ of error, and for an order fixing the amount of bond in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 1 day of July, A. D., 1902.

KINGSBURY & KINGSBURY, and
ALFRED A. FRASER,
Attorneys for Plaintiff.

Order Allowing Writ of Error.

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at $500.00.

Dated this 1st day of July, A. D. 1902.

JAS. H. BEATTY,
Judge.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Plaintiff,

vs.

BOISE CITY,
Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely in its prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. Has anything been paid for water taken for sprinkling purposes by the city that was taken since August 28, 1901?" and erred in not allowing the witness to answer such question.

II.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. I will ask you if during the time alleged in the complaint in which it is alleged the defendant took this water, if the cold water system was paying dividends or producing a profit?" and erred in not allowing the witness to answer this question.

III.

The Court erred in directing the jury to bring in a verdict for defendant and erred in giving the jury the instruction in the words following: "You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant."

THE VERDICT NOT SUSTAINED BY THE EVIDENCE.

Plaintiff also excepts to the verdict of the jury on the ground that it is not sustained by the evidence, and is contrary to the evidence, and specifies the following particulars in which the verdict is not sustained by the evidence, and is against the evidence: First, the evidence showed that the plaintiff was entitled to recover; Second, the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence and the admissions of the answer that the plaintiff was a corporation as alleged in the complaint, and was the successor in interest of the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and that at the time of bringing the action it was the owner of the claim set forth in the complaint; that the evidence showed the taking of the water as alleged by the city, and the value of the same is admitted by the answer, and that what was taken prior to August 28th, 1901, as stated in the first cause of action, had not been paid for.

That the verdict was not sustained by the evidence also for the reason that the evidence showed the corporate existence of the plaintiff, the transfer to the plaintiff by the Artesian Hot and Cold Water Company, of all

its properties, together with the claim and all claims against the city, and shows that plaintiff was entitled to recover for water taken from said system of waterworks outside the limits of said city to the amount of 1,000,000 gallons, of the value of $125.00.

And that the verdict is contrary to the evidence in this that the evidence shows, together with the admissions of the answer, that the defendant city in the year 1900 took from the said hot waterworks system water of the value of $1,234.27, and has never paid for the same, refuses to pay for the same, and that the plaintiff was and is the owner of the said claim.

And that the verdict is not sustained by the evidence in that it is shown by the evidence and the admissions of the answer that in the year 1900, the city took from the said cold water system water to the value of $4,936.98, and has never paid anything therefor, and refuses to pay therefor, and that plaintiff is and was the owner of the claim for the value of the same.

And that the verdict is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence under the pleadings that in the year 1901, prior to August 28th of that year the said city took water from the said hot waterworks system to the value of $826.00 and has paid nothing for the same, and refuses to pay for the same, and that the plaintiff at the time of bringing this action was and is now the owner of this claim for the same.

And that the verdict is not sustained by the evidence and is against the evidence also in this, that it appears from the evidence and the pleadings that in the year 1901, and prior to August 28th, of that year, the said de-

fendant city took from the said cold water system water to the value of $3,312.00 for street sprinkling purposes and has not paid anything therefor, and that the plaintiff is the owner of the claim for the payment of the same and was such owner at the time of bringing this action.

And that the verdict is not sustained by the evidence and is contrary to the evidence also in this, that it appears by the evidence and the admissions of the answer that the plaintiff is a corporation as alleged, doing business in Idaho, is successor in interest in the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and was such owner and has been such successor since the 28th day of August, 1901; and that of the waters taken, belonging to the said Artesian Hot and Cold Water Company, Limited, in the years 1900 and 1901 by the said city and not paid for, and for which the said city refuses to pay anything, and which were used for street sprinkling purposes by the said city, water of the value of $7,500.00 was so taken by the city and used for sprinkling its streets in front of the lots and properties of other private parties, abutting on streets and parts of streets sprinkled.

And that the verdict is contrary to the evidence and is not sustained by the evidence in this also, that the evidence shows that plaintiff is a corporation doing business in Idaho, as alleged in the complaint, and was at the time of bringing this action the successor of the said Artesian Hot and Cold Water Company, Limited, in interest in the said waterworks, and owned the said claim sued upon, and that in the years 1900 and 1901, and

prior to August 28th, 1901, the said city took water from the said waterworks system and used the same in sprinkling the streets in front of the blocks of said city in the parts of the said city where the inhabitants thereof were supplied with water not by the said Artesian Hot and Cold Water Company, Limited, but by Peter Sonna and from a different and distinct system of waterworks, and for such purposes and uses the said city took large amounts of water to the great damage of the said Artesian Hot and Cold Water Company.

And that the verdict is not sustained by the evidence and is against the evidence in that from the evidence and the admissions of the answer, it appears that the plaintiff is a corporation, as alleged in the complaint, doing business in Idaho as the successor of the said Artesian Hot and Cold Water Company and has been such successor and was doing business since the 28th day of August, 1901, and is the owner of the waterworks mentioned and in possession of the same and carrying on the same since the last-mentioned date; and that the defendant between the 28th day of August, 1901, and January 1st, 1902, took, without permission and against the protest and objection of plaintiff, 25,480,000 gallons of water belonging to the plaintiff and used the same in sprinkling it upon the streets of the city, and that the water was of the value of $3,160.00; and that it was used upon its streets and for sprinkling such parts thereof as were in front of lots owned by other and private persons, waters of the value of $2,300.00, and that of the waters so taken waters of the value of $900.00 were taken and used by the defendant upon its streets for sprinkling the

same in blocks of said city, and portions of said city where the said Peter Sonna furnishes the inhabitants thereof from his waterworks system, and that the said waters were taken by the said city against the objection and protest of the plaintiff, and under a claim made by the said city that the waters were free and that it did not have to pay for the same.

That the verdict is not sustained by the evidence and is contrary to the evidence and the admissions of the answer also in this, that it was shown to have been beyond the extent of the means of the plaintiff and of its said immediate predecessor to furnish water for purposes of street sprinkling to the extent taken by defendant.

KINGSBURY & KINGSBURY,
ALFRED A. FRASER,
Attorneys for Plaintiff.

[Endorsed]: No. 199. In Circuit Court of United States for District of Idaho, Central Division. Boise Artesian Hot and Cold Water Co., Plaintiff, vs. Boise City, Defendant. Petition for Writ of Error and Assignment of Error. Filed July 1, 1902. A. L. Richardson, Clerk. Kingsbury & Kingsbury and A. A. Fraser, Attorneys for Plaintiff.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Plaintiff,

vs.

BOISE CITY.
Defendant

Bond on Writ of Error.

Know all men by these presents, that we, the Boise Artesian Hot and Cold Water Company, Limited, as principal, and Alfred Eoff and C. W. Moore, as sureties, are held and firmly bound unto the city of Boise City, defendant above named, in the sum of five hundred ($500.00) dollars, to be paid to the said Boise City, or to its proper officer, attorney or agent, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents. Sealed with our seals and dated the 28th day of June, 1902.

Whereas, the above-named plaintiff, the Boise Artesian Hot and Cold Water Company, Limited, has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the

United States for the District of Idaho, Central Division.

Now, therefore, the condition of this obligation is such that if the above-named Boise Artesian Hot and Cold Water Company, Limited, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[Seal] By C. W. MOORE,
President.

B. S. HOWE,
Secretary.

C. W. MOORE,
A. EOFF,
Sureties.

State of Idaho, } ss.
County of Ada }

Alfred Eoff and C. W. Moore, whose names are subscribed as sureties to the above bond, being severally duly sworn, each for himself, says: That he is a resident and freeholder in said Ada County, Idaho, and worth the sum in the said bond specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. W. MOORE,
A. EOFF.

Subscribed and sworn to before me this 28th day of June, 1902.

[Seal] W. S. BRUCE,
Notary Public.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, Plaintiff, vs. Boise City, Defendant. Bond on Writ of Error. Filed July 1st, 1902. A. L. Richardson, Clerk.

Bond approved.

BEATTY,
Judge.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the City of Boise City, Idaho, and to W. E. Borah, J. J. Blake and Charles S. Kingsley, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the Boise Artesian Hot and Cold Water Company, Limited, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of Supreme Court of the United States of America, this 1st day of July, A. D. 1902, and of the independence of the United States the one hundred and twenty-sixth.

JAS. H. BEATTY,
United States District Judge, Presiding in the Circuit Court for the District of Idaho.

Attest:

[Seal] A. L. RICHARDSON,
Clerk.

Service of the within citation and receipt of a copy thereof is hereby admitted this 1st day of July, 1902.

CHAS. S. KINGSLEY,
J. J. BLAKE, and
W. E. BORAH,
Attorneys for Defendant in Error.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, Limited, Plaintiff, vs. Boise City, Defendant. Citation. Filed July 1, 1902. A. L. Richardson, Clerk.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Central Division, of the State of Idaho, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Boise Artesian Hot and Cold Water Company, Limited, a corporation, defendant and plaintiff in error, and Boise City, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said Boise Artesian Hot and Cold Water Company, Limited, a corporation, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 31st day of July, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the first day of July,

in the year of our Lord one thousand nine hundred and two.

[Seal] A. L. RICHARDSON,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Central Division, of the State of Idaho.

Allowed by:

JAS. H. BEATTY,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 1st day of July, 1902.

CHAS. S. KINGSLEY,
J. J. BLAKE, and
W. E. BORAH,
Attorneys for Defendant.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Idaho.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho. Boise Artesian Hot and Cold Water Company, Plaintiff, vs. Boise City, Defendant. Writ of Error. Filed July 1, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Plaintiff in Error,
vs.
BOISE CITY,
Defendant in Error.

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States in and for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered 1 to 118, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record and the return to the annexed writ of error.

I further certify that the cost of said record, amounting to the sum of $80.70, has been paid by the plaintiff in error.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 10th day of July, A. D. 1902.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 864. In the United States Circuit Court of Appeals for the Ninth Circuit. The Boise City Artesian Hot and Cold Water Company, Limited, Plaintiff in Error, vs. Boise City, Idaho, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed July 21, 1902.

F. D. MONCKTON,
Clerk.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

FEBRUARY TERM, 1903.

BOISE CITY ARTESIAN HOT & COLD WATER COMPANY,
Plaintiff in Error.

vs.

BOISE CITY,
Defendant.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR BY

SELDEN B. KINGSBURY,
Of Counsel for Plaintiff.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

FEBRUARY TERM, 1903.

BOISE CITY ARTESIAN HOT & COLD WATER COMPANY,
Plaintiff in Error.

vs.

BOISE CITY,
Defendant.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR BY

SELDEN B. KINGSBURY,
Of Counsel for Plaintiff.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

FEBRUARY TERM, 1903.

BOISE CITY ARTESIAN HOT & COLD WATER COMPANY,
Plaintiff in Error.

vs.

BOISE CITY,
Defendant.

STATEMENT OF THE CASE.

This case is in this Court upon a Writ of Error to the United States Circuit Court for the District of Idaho, to correct error of that Court in the record and proceedings and also in the final judgment on verdict of jury, rendered by direction of the Court, to the effect that plaintiff takes nothing by this action and that defendant recovers its cost herein.

Four specifications of error are assigned: two relate to

rejection of evidence; the third is that the Court erred in charging the jury to find for defendant; and the fourth is to the verdict as against law and not sustained by the evidence; but, practically, they each and all raise but *one question*, and that is the question presented on this hearing, and relates to whether or not the plaintiff corporation and its immediate predecessor were, by law, obliged to furnish the defendant city *water for street sprinkling purposes, free of charge,* at the times, in the manner, and under the conditions set forth in the complaint.

The defendant city bases its claim to such water *free* upon secs. 2710 and 2711 of the Revised Statutes of Idaho, 1887, which, as far as applicable, read:

"Sec. 2710. No corporation formed to supply any city or "town with water must do so unless previously authorized "by an ordinance of the authorities thereof, or unless it is "done in conformity with a contract entered into between "the city or town and the corporation. * * *

"Sec. 2711. All corporations formed to supply water to "cities or towns must furnish pure, fresh water to the inhab- "tants therefor for family use, so long as the supply permits, "at reasonable rates and without distinction of person upon "proper demand thereof; and must furnish water to the "extent of their means in case of fire and other great neces- "sity, free of charge."

The plaintiff claims:

First—That said statute is repealed by the Constitution of Idaho and by acts of the Legislature thereunder.

Second—That, whether repealed or not, it does not bind the plaintiff and did not its predecessor in interest in the water works for various reasons, one of which is that neither the plaintiff nor any of its said predecessors, except two certain persons, H. B. Eastman and B. M. Eastman, known as

the Eastman Brothers, ever received from the State or the city any grant, franchise, easement or license, but are operating and always did operate, in the laying of pipes and the furnishing of water, under and by virtue of a grant made, not to any corporation, but to said two individuals, and which was purchased by plaintiff and its said corporate predecessors.

Another of which is that it is not and was not within the "extent of the means" of the water company to furnish water to the extent demanded and taken for street sprinkling purposes.

Another of which is that, by the laws of the State, and by the charter of the city, water for street sprinkling is for a local benefit, or improvement, to be paid for by the owners of property abutting on streets sprinkled.

And another question relates to a large portion of the water which is demanded and taken and used by defendant, in sprinkling streets in blocks and portions of the city where the water is supplied to the inhabitants thereof, not by plaintiff, but by another person, an individual from whom no water for such, or any, street sprinkling purpose is demanded or is taken, but the plaintiff's water instead.

And another is that, on account of the nature of the waters, and especially of the hot artesian water, such a statute, as defendant relied on, has no application; and that such waters were not within the legislative intent in such statute; nor was it within legislative power to provide that for any such purpose such waters shall be furnished free of charge.

The water company having refused to furnish free water for such purpose and having forbidden the taking of its waters and having shut off the same from the city as far as able without shutting off water used for fire and other purposes,

the city took the water in manner set forth, which plaintiff claims was wrongful and a trespass. The city took the hot water as set forth in the complaint, also took cold water as set forth, and used them both for street sprinkling, as alleged. The main question here and the real contest between the plaintiff water company and the city is and has been as to whether the water company must furnish water for street sprinkling free of charge.

STATEMENT OF FACTS.

This is an action, sounding in tort, for the wrongful taking of plaintiff's and of its immediate predecessors' properties by the defendant.

Two causes of action are set forth in the complaint. The first is for damages for such taking, prior to the time when plaintiff became the owner and operator of said water works, and while its immediate predecessor owned and operated them, and which accrued to such predecessor, which assigned it to plaintiff. The second is for damages on account of such taking, suffered by plaintiff since it became the owner and operator of said water works. The causes of action are the same, except that one is on an assigned claim and the other is not.

The facts set forth in the complaint are nearly all admitted by the answer, although the answer attempts to deny most of them.

That plaintiff is a corporation of the State of West Vir-

ginia is shown by its certificate of incorporation. (Trans. p. 93.)

That plaintiff is, as alleged, acting as such corporation in Ada County, Idaho, and carrying on and operating said water works is shown by the testimony of B. S. Howe. (Trans. p. 88.)

That plaintiff is the owner of the water works properties and of the claim set forth in first cause of action is shown by Exhibit "B," p. 96 of Trans., and by Exhibit "C," p. 103 of Trans.

That the amount involved in the controversy exceeds the sum of $2,000, as to each cause of action, sufficiently appears by the respective values of the waters alleged to have been so wrongfully taken by defendant.

Paragraph "IV" of complaint alleges that at all times since March 28th, 1891, down to August 28th, 1901, there existed a certain private corporation, acting and doing business as such, named the Artesian Hot & Cold Water Company, Limited, organized and existing under the general laws of Idaho, and that it was the predecessor in interest in the water works rights and properties mentioned in the complaint and in the ownership and operation of the same. None of this allegation or paragraph IV is denied.

Paragraph "V" of the complaint alleges the ownership and operation of the water works of plaintiff's immediate predecessor, that the same were of great value, the nature of the water supply as being from discovered and developed wells on lands owned by the water company and that the waters were not appropriated from any pond, lake, stream or natural source or supply of water, or from any of the public waters of the State. That its business was, among other things,

the operation of a cold and of a hot water plant in Ada County, Idaho, in and in the vicinity of Boise City. That it owned and operated with and on its own properties its own waters only, all situate upon its own lands, except certain underground pipes which run through other lands over which it has easement, right of way and franchise. That its waters are expensive, being developed, supplied and maintained at great cost. That the founders, creators and original owners and first operators of said water plant and water works were H. B. Eastman and B. M. Eastman. That said Eastmans, as soon as they had discovered and developed and collected of such said waters sufficient to supply water for domestic use to the inhabitants of said city, applied for and obtained by grant on the third day of October, 1889, a franchise from defendant city, in words as follows, to-wit:

"AN ORDINANCE GRANTING EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

"The Mayor and Common Council of Boise, City, Idaho, "ordain:

"Section 1. H. B. Eastman and B. M. Eastman and their "successors in interest in their water works, for "the supply of mountain water to the residents "of Boise City, are hereby authorized to lay "and repair their water pipes in, through, along "and across the streets and alleys of Boise City under the "surface thereof; but they shall, at all times, restore and "leave all streets and alleys in, through, along and across "which they may lay such pipes, in as good condition as they "shall find the same, and shall, at all times, promptly repair

"all damage done by them or their pipes, or by water escaping "therefrom.

"Sec. 2. This ordinance shall take effect from and after "its passage and approval.

"Approved October 3rd, 1889."

The source of the water or that it was "mountain water" and the fact that the business was that of operating both a hot and cold water plant in and in the vicinity of said city and the fact that they did operate them, and the fact that the Eastmans applied for and obtained the grant, and the fact that the same company had its office and place of business in Boise City and was the predecessor in the operation of said water works in the city of plaintiff, are matters within the information and sources of information and belief of defendant, and to allege that it "has not sufficient information or belief," is not to allege that it has no information or belief, and it should answer according to its belief, sufficient or otherwise.

The said Eastmans accepted said grant and franchise and immediately continued to lay water pipes in the streets of the city and to extend the same from time to time as they increased their supply of water, and as demand therefor increased, and to charge, collect and receive reasonable water rates from all whom they supplied and did and performed all things obligatory upon them by reason of said franchise and their acceptance of the same and of the operation of said water works under said franchise.

In 1890 said Eastmans and others formed a corporation known as the Boise Water Works Company, under general laws of Idaho as a private corporation, which became and was the successor in interest of the said Eastmans in and to

their said water works, and in said grant and franchise from said city, and as such successor all the duties and liabilities appertaining to said water works and said franchise in the hands of said Eastmans and was by all persons recognized as such successor with such duties and liabilites.

On March 28th, 1891, the Artesian Hot & Cold Water Company, Limited (also designated in the pleadings for convenience as the "Idaho Company") was formed and organized, and became and was the successor of the said Boise Water Works Company, and of said Eastmans, in the said water works and the said grant and franchise made to Eastmans by the city and was so known and recognized by all persons, and acted as such down to August 28th, 1901, and it in like manner, and with like limitation, assumed the duties and liabilities pertaining to said water works and to said grant and franchise which were assumed by and were obligatory upon the said Eastmans, and owned all said water works, properties, rights, franchises and privileges and operated the same as such successor down to August 28th, 1901, and during all these times did and performed all it was obligated to do by virtue of such operation, ownership and successorship.

That said Eastmans and others prospected by deep boring into the rocks of the mountains upon their own lands for both hot and cold waters and discovered the same at an average depth of 400 feet, and that said Eastmans sold and conveyed the wells, waters and lands on which the wells were situated to said water company and that these waters are the waters employed and used in supplying both hot and cold waters to the citizens of Ada County, in and in the vicinity of the said city, for reasonable compensation.

That, in and for the year 1897, the city and the water com-

pany entered into a contract whereby the company was to furnish water for street sprinkling purposes, and the city was to pay for same, and the company was to erect stand pipes for the convenience of the city in taking the water, and to enlarge its water mains within ninety days thereafter from six-inch mains to ten-inch mains.

That in order to have sufficient supply of water for its other uses, and the uses of its customers, together with what, under contracts with defendant, would be used for street sprinkling, and in accordance with the terms and conditions of said contract, and to carry out the same on its part, the said company did, as it had in said contract with defendant agreed to do, within ninety days from and after the execution of said contract, lay a ten-inch main pipe from its pumping station to said city, and that, except for supplying said city with water, as by said contract was contemplated and provided for, the six-inch main which until then extended from said water works, reservoirs and plant to said city, was sufficient and adequate for all purposes and uses of said company and its patrons.

For the year 1898, a like contract was made and entered into between said city and said Idaho Company, whereby said company was to erect and maintain at its own expense, stand pipes for the convenient taking and use of said waters when and where requested so to do by said city, and the said city was to have of its said waters water for street sprinkling purposes at certain agreed rates per front foot of properties abutting on streets sprinkled, the same being in proportion to amounts of water taken and used on various streets respectively, the said city to pay for same at such rates, which it did accordingly; and the said company did all it was required

to do, or was obligated to do, under said contract, or otherwise; that for the year 1899, the said Idaho Company and the said city made and entered into a like contract for water for street sprinkling to those theretofore made as aforesaid, and each party thereto carried out what it was required to do under said contract, except that the said city has not yet fully paid the company the moneys due thereunder.

In each and all of said contracts the said parties thereto distinguished between the taking and using of waters for street intersections and alley crossings and those used on portions of streets before lots abutting thereon, and in which latter case the cost thereof was assessed with other costs of sprinkling same to owners of such lots, and was by the city collected from such owners, and paid over to the said company.

That during the existence of said Idaho Company prior to 1900 it had, as such water company, and as such successor in interest, ownership and operation of said water works, rights and properties and all belonging or appertaining thereto, at all times and continually dealing with said city as such water company, with such rights, privileges and properties, entered into contracts of various kinds with said city concerning the use of its waters and the supplying the same, including contracts for furnishing water for fire purposes and for street sprinkling purposes, and all these contracts were, prior to 1900, faithfully carried out by both parties thereto, and the performance and execution were in every way acceptable to and approved by said city, and were reasonable, fair and legal; and in preparing to carry out what was agreed to in, and contemplated by, said contracts, for water for fire and street sprinkling purposes, it, as was then and there under-

stood, agreed and promised by and between the said parties thereto, became and was necessary and the said company was obliged to, and did, go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand pipes, in the increasing of its pumping plant, in the purchasing of a steam boiler, engine and pump, and in various and other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said water works for all other purposes than street sprinkling. And such said extra expense was incurred in pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such continuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street sprinkling was conceded, acquiesced in, and respected by the defendant and by all persons; and defendant contracted thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collected the same both by legal proceedings in the courts and otherwise.

That the said Idaho Company at great expense improved said system of water works and largely increased its water supply; it invested in said water works system and property used in connection therewith, a sum equal to three hundred and forty thousand dollars, a large portion of which was made necessary to enable said company to furnish the said city with water for municipal purposes, particularly for sprinkling the streets, and extinguishment of fires, and said

company was, especially during the last two years, put to great additonal expense in the daily operation of its said water works system on account of the great quantities of water taken and used by said city for street sprinkling; such additional expense was in about the sum of nine hundred dollars per month over and above what would have been otherwise required.

That the said Idaho Company had a several and separate contract with said city for each of the years 1897, 1898, 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the said city agreed to pay to the said company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city.

Said Idaho Company, the immediate predecessor of plaintiff, had no other grant or franchise under which it operated, except that granted to said Eastmans, and operated under that grant and dealt with all persons and with defendant as such water company, the successor of said Eastmans and of said Boise Water Works Company.

The waters of the company are supplied by wells, the natural flow of which is sufficient to nearly supply the necessary amount of water for domestic use and other uses, except for street sprinkling and to keep up the supply when water is taken for street sprinkling requires extra pumping, and all that was taken for street sprinkling had to be supplied by extra labor, expense and pumping.

Said water company dealt with said city, with Ada County

and with the State of Idaho and furnished waters to them, both hot and cold, at all times since its formation in 1891, down to the time it ceased to operate said water works in August, 1901.

In 1900 defendant refused to contract for water for street sprinkling purposes.

Prior to 1897, the water taken from said water works for street sprinkling was obtained from the company directly by the owners or occupiers of lots abutting on streets sprinkled.

In 1897 the charter of the city was amended so as to empower the Mayor and Common Council to "provide for the "sprinkling, cleaning and repairing of the streets at the cost "of owners of abutting property." Thereafter, and down to 1900, the city assumed to and did, instead of said owners of abutting lots, contract for water for such purposes with said company, by which contract it was to pay and did pay a reasonable compensation for water for street sprinkling purposes.

The defendant admits the taking of the waters as set forth in the complaint, but denies the *wrongful taking*.

Plaintiff brings this action to recover damages for the wrongful taking of both hot and cold waters from its said systems. The first cause of action is for waters so taken between January, 1900, and August 28, 1901, while the systems and waters were owned by the said immediate predecessor of plaintiff, and the claim for which was sold, transferred and assigned to plaintiff, together with other properties, rights and claims, on August 28, 1901. The second cause of action is for such taking of hot and cold waters from said systems since plaintiff became the owner of and successor in interest to said Idaho Company in said properties and busi-

ness, and covers the period of time between August 28, 1901, and the bringing of this action. All the waters so taken, both hot and cold, were used upon the streets of said defendant city by defendant for sprinkling the streets.

It has never been the habit, custom, condition or policy in or of the State of Idaho for any city or town to be furnished water for street sprinkling by any person, association or corporation free of charge.

In 1897 the Legislature of Idaho for the first time passed laws regarding street sprinkling and passed an act of general application entitled "An Act to provide for the organization, government and powers of cities and villages," which act provides that cities and villages may enact ordinances for the following purposes: "Seventh. To provide for sprinkling the streets, avenues and thoroughfares therein, or such "parts thereof and for such time as may be deemed necessary, "by contract or otherwise; and to levy a special tax on the lots "or parcels of ground fronting or abutting upon such street, "avenue or thoroughfare, so to be sprinkled, to pay the expenses of such benefit or improvement. The next subdivision of the section provides how the assessment is to be made, and provides: "All such assessments shall be known as 'special assessments for improvements,'" and the same provisions are in the act passed in 1899 under same title.

The waters of the systems of water works owned and operated by plaintiff and its predecessors are not appropriated waters, but well waters. Three are hot water wells and the rest, twenty-six in number, are cold water wells, and twenty of them are flowing wells.

Since March, 1900, and prior to August 28, 1901, the defendant took from said water works 250,000 gallons of water

each day for street sprinkling, and to furnish such water into its pipe lines cost the company over $55.00 each day over and above what its expenses would otherwise have been, and that the said water taken was worth the sum of twelve and one-half cents per thousand gallons, and that between such said dates the water was so taken for over 400 days.

There is in, through, around and under the defendant city an abundance of cheap water suitable for street sprinkling purposes.

(Paragraph XIX of the complaint, page 17.)

Neither plaintiff nor its predecessors in interest in said water works enjoy or ever have enjoyed any special, peculiar or exclusive privileges or any monopoly or virtual monopoly.

(Paragraph XX of complaint, page 16.)

Connected with fire hydrants under contract to furnish water for fire purposes; number of hydrants, sixty; used waters on streets where Sonna supplied the inhabitants.

(Paragraph XXI of complaint, page 19.)

Not usage, custom or public policy of State to require free water for street sprinkling.

(Paragraph XXV of complaint, page 21.)

In taking said water company's said waters, the defendant elected to use and consume expensive waters belonging to the company rather than cheap waters running around, through and under said city.

(Paragraph XXVI of complaint, page 22.)

In the year 1900 the city took from said company's water works, water for street sprinkling to the amount of 49,370,000 gallons, of which 9,874,000 gallons were hot water, out of its said hot water system; and 39,496,000 gallons were

cold water, out of its said cold water system; said waters were then and there of the value and worth of 12½ cents per thousand gallons. The value of the hot water taken in the year 1900 was $1,234.27, and the value of the cold water so taken in 1900 by the city from said company's water works system was then and there of the value of $4,936.98.

That in the sprinkling season of 1901, prior to August 28th, 1901, the city took water from said company's water works to the amount of 33,120,000 gallons, of the worth and value of 12½ cents per one thousand gallons. Of the water so taken in 1901, 6,624,000 gallons were hot water out of said hot water system, and 26,496,000 gallons were cold water out of said cold water system. The value of said hot water taken in 1901 prior to August 28th of that year was $828 and the value of said cold water taken in 1901 prior to August 28th of that year was $3,312, and said company was, by said taking, damaged in the sum and amount of $10,500, no part of which has been paid and no compensation had on account thereof.

(Paragraph 27 of complaint, page 22.)

That of the waters so taken in 1900 and 1901, prior to August 28th of that year, and used by the city in the sprinkling of streets in front of the lots owned by other persons and abutting on portions of streets sprinkled, water of the value of $7,500 was so taken and used for the benefit and advantage of such owners of such abutting property to the damage of said water company in the sum of $7,500.

(Paragraph XXVIII of complaint, page 24.)

In addition to the said waters so taken as heretofore mentioned by the city from said company's water works, the city did, in 1900 and 1901, in the same manner, take from its said

system of hot water pipes, situated outside of the limits of the city, water to the amount of 1,000,000 gallons and of the worth and value of $125, for which the water company never received any compensation whatever and for which the defendant has refused to pay and has proclaimed and given notice that it will take and will never pay for the same.

(Paragraph XXIX of complaint, page 25.)

That on the 28th day of August, 1901, the said Idaho Company decided, resolved and determined to go out of business and existence and to make plaintiff its successor, and did then turn over and transfer, sell, assign and convey to plaintiff all its properties, business, claims, demands, accounts, rights, privileges, franchises, water works, and all pertaining thereto, and all claims, rights and contracts connected therewith, and all moneys, damages and claims due and owing to it, arising either from contract or *ex delicto*, including this claim and every claim which it had against the city, and the plaintiff did purchase and accept the same and enter into and go on with said business and became the successor of the said Idaho Company, and ever since has remained such successor and as such has dealt with the defendant and all other persons.

Said Idaho Company caused proceedings to be had in an action brought in the District Court of the Third Judicial District of the State of Idaho, County of Ada, such that the judgment and decree of said Court was made and entered dissolving said Idaho Company, and the said company does not now exist, and plaintiff is the successor of the same; owner and operator of said water works, and as such has continually dealt with the defendant and all other persons.

(Paragraph XXX of complaint, page 25.)

The Idaho Company, the immediate predecessor of plaintiff, ceased to do business August 28th, 1901, and ceased to exist, and by a decree of Court was dissolved.

The taking of the waters and the contracts of 1897-8-9 are admitted, except only that defendant denies the power of the city and company to contract on the ground that the water was free, and of no value because free.

One-fourth of the waters taken were for sprinkling blocks in which Mr. Peter Sonna furnishes water to the inhabitants and where said water companies did not furnish any water.

SECOND CAUSE OF ACTION.

The second cause of action is like the first, except as to the value and amount of waters taken and except that it is for damages resulting from the taking of the waters from said water works since August 28th, 1901, and prior to the 1st day of January, 1902, and while this plaintiff was the owner and operator of said water works.

The waters taken between said last mentioned dates from the plaintiff's works by the city and used for street sprinkling purposes amounted to 25,480,000 gallons, and that during said time the defendant wasted waters of the plaintiff to a large amount and to the amount, as plaintiff is informed and believes, of 16,000,000 gallons, of the value of $2,000, to the plaintiff's damage in the sum of $2,000.

That the waters taken from plaintiff's water works during this time and used for street sprinkling was of the value of $3,160.

That of the waters so taken and used in the sprinkling of the streets in front of lots owned by other and private persons,

waters of the value of $2,300 were so taken by the city, to plaintiff's damage in the sum of $2,300.

That plaintiff's waters were taken by the city and used for street sprinkling in blocks where Peter Sonna furnished water to the inhabitants thereof and to those doing business therein to the value, as plaintiff is informed and believes, of $900, to plaintiff's damage in the sum of $900.

Defendant does not deny the taking of the waters as alleged and does not deny the value of the waters so taken according to the several specifications and items set forth in both causes of action constituting the complaint.

Plaintiff proved on a trial that it commenced said business on the 28th day of August, 1901. That it dealt with the city, rendered bills to the city for water furnished, which were paid by the city; that the old company ceased to do business on the 28th day of August, 1901. That the water of the company was from wells, and all but one artesian wells, and that there were, all told, flowing and abandoned wells to the number of 29; that eight or nine had ceased to flow; that nothing had been paid by the defendant on the first cause of action set forth in the complaint. When the witness was asked the following question:

"Q. Has anything been paid for water taken for sprink-"ling purposes by the city that was taken since August 28th, "1901? (Objected to by defendant for the reason that it is "irrelevant, incompetent and immaterial, for the reason that "if it was taken for sprinkling purposes, there could be no "charge made for it by the plaintiff.) The objection was "sustained and exception taken."

The witness testified that the water was taken by the city partly by attaching stand pipes to the fire hydrants and partly by opening the company's valves and taking it from the com-

pany's stand pipes. That the company never gave them permission to do this and always objected to it. That the company served notice upon the city at different times not to take the water for sprinkling purposes, and that Exhibit "D" is one of such notices. That at the time plaintiff company purchased the properties, an advertisement was put in all the papers of Boise, being a notice signed by each company, the one going out and the one coming in, and that Exhibits "F" and "G" are copies of such notices. That they were published in four papers in said city, beginning on the 29th or 30th day of August, 1901. That immediately after receiving the notice of the passage of Ordinance No. 304, the witness served upon the Mayor of the city a notice that the company refused to accept the ordinance, that it did not need the pretended grant the franchise contained, and that it considered the same illegal and void. That the gravity supply of the water company in 1901 was 1,400,000 gallons per year, and that all the rest of the water had to be pumped from wells; that the gravity flow was sufficient outside of lawn sprinkling to furnish the customers of the company for domestic uses; that if no water had been used for sprinkling in the summer of 1901, it would have required on an average 400,000 gallons of water to be pumped each year, and that the taking of water by the city for sprinkling purposes made it require about five hours a day more pumping. Testified that all the cold water that was used for sprinkling the streets was obtained by pumping. That the pump runs by steam power and that coal was used for fuel; that the cost of the water system to the company was between $335,000 and $340,000, and that the cost of the cold water system was from $212,000 to $240,000. The witness was then asked: "Q. I will ask

"you if during the time alleged in the complaint, in which it "is alleged that the defendant took this water, if the cold "water system was paying dividends on properties, or any "profit? (Objected to by counsel for the defendant as incom- "petent, irrelevant and immaterial, for the reasons "that it would be simply a question of fixing the "rates under the statutes as to whether it was pay- "ing or not.) Objection was sustained by the Court. "Exception was taken, and allowed by the Court." The witness Howe gave the above testimony, first testifying that he was the secretary and assistant manager of the plaintiff company and had been, during all the times mentioned, such officer and manager of the plaintiff's predecessor corporation. Testimony of B. S. Howe, beginning on page 88.

Plaintiff's Exhibit "A," page 93, is its certificate of incorporation.

Plaintiff's Exhibit "B," page 96, is the deed given by its predecessor, The Artesian Hot & Cold Water Company, Limited, to the plaintiff on August 28th, 1901, conveying said water works, properties and all pertaining thereto. Plaintiff's Exhibit "C," page 103, is the bill of sale and assignment by plaintiff's predecessor, by which all of the personal property, choses in action, dues and claims of every nature and kind sold and assigned to the plaintiff and its franchises, rights and privileges. Plaintiff's Exhibit "D," page 105, is one of the notices to the Mayor and Common Council not to take water. Plaintiff's Exhibit "E," page 106, is another notice to the Mayor and Common Council of the city given by the plaintiff, forbidding the city to take the water or use the stand pipes and requesting it to cease trespassing upon its property, etc.

Plaintiff's Exhibit "F," page 105, is a notice to the public and to the patrons and customers of the water works, from the plaintiff's predecessor, showing the fact that it had turned

over the water works to the plaintiff. Plaintiff's Exhibit "G," page 109, is the notice of plaintiff on taking possession and beginning business as such water works company.

Defendant offered no testimony except Exhibit "I," page 111, which is a copy of the articles of incorporation of the immediate predecessor of plaintiff.

CONSTITUTIONAL, STATUTORY AND CITY CHARTER PROVISIONS.

A franchise, like other *property*, is subject to the law of eminent domain.

Constitution of Idaho, section 8, article 11, reads: "The "right of eminent domain shall never be abridged or so con- "strued as to prevent the Legislature from taking the prop- "erty and franchise of incorporated companies, and subject- "ing them to public use, the same as property of individuals; "and the police powers of the State shall never be abridged "or so construed as to permit corporations to conduct their "business in such manner as to infringe the equal rights of "individuals, or the general well-being of the State."

STATE COMITY EXTENDED TO FOREIGN CORPORATIONS.

Constitution, section 10 or article XI, reads as follows: "No foreign corporation shall do any business in the State "without having one or more known places of business, and "an authorized agent or agents in the same, upon whom "process may be served, and no company or corporation "formed under the laws of any other country, State or ter- "ritory, shall have or be allowed to exercise or enjoy within "this State any greater rights or privileges than those pos- "sessed or enjoyed by corporations of the same or similar "character created under the laws of this State."

Section 2653 of the Revised Statutes of Idaho, 1887, provides: "Every corporation not created under the laws of "this territory, doing business in this territory, must within "three months after the passage of this title, or from the "time of commencing to do business in this territory, designate

"some person residing in the county in which the principal "place of business of such corporation in this territory is con- "ducted, upon whom process, issued by authority of or under "any law of this territory may be served, and within the time "aforesaid must file such designation in the office of the Sec- "retary of the territory and in the office of the Clerk of the "District Court for such county; * * * provided, how- "ever, that such foreign corporation complying with the pro- "visions of this section shall have all the rights and privileges "of like domestic corporations, including the right to exercise "the right of eminent domain, and shall be subject to the laws "of this territory, applicable to like corporations.'

FRANCHISES MAY BE TRANSFERRED—PUBLIC POLICY RELATING TO SAME.

Section 15, artice 11 of the Constitution reads as follows: "The Legislature shall not pass any law permitting the leas- "ing or alienation of any franchise so as to release or relieve "the franchise or property held thereunder from any of the "liabilities of the lessor or grantor, or lessee or grantee, con- "tracted or incurred in the operation, use or enjoyment of "such franchise, or any of its privileges."

CORPORATIONS—NATURE OF.

Section 2575, Rev. Stat., 1887, reads: "Corporations are "either public or private. Public corporations are formed or "organized for the government of a portion of the territory; "all other corporations are private."

Section 2576, provides: "Private corporations may be "formed by the voluntary association of any five or more

Section 2577 reads: "Private corporations may be formed "for any purpose for which individuals may lawfully asso- "ciate themselves."

Section 2578 reads: "The instrument by which a private "corporation is formed is called 'Articles of Incorporation.'"

Section 2633 provides: "Every corporation, as such, has

"power * * * to purchase, hold and convey such real "and personal estate as the purposes of the corporation may "require, not exceeding the amount limited by this title: " * * * * to enter into any contracts or obligations essen- "tial, necessary or proper to the transaction of its ordinary "affairs, or for the purpose of the corporation."

Section 2638 reads: "No corporation must acquire or hold "any more real property than may be reasonably necessary "for the transaction of its business, or the construction of its "works, except such right of way or other property as it may "acquire under the laws of Congress, or as may be otherwise "specially provided. A corporation may acquire real prop- "erty, as provided in the Code of Civil Procedure, when "needed for any of the uses and purposes there mentioned."

Section 2642, Rev. Stat., 1887, reads: "For the satisfac- "tion of any judgment against a corporation authorized to "receive tolls, its franchise and all the rights and privileges "thereof may be levied upon and sold under execution in the "same manner and with like effect as any other property."

Section 2643, Rev. Stat., 1887, reads: "The purchaser at "the sale must receive a certificate of purchase of the fran- "chise, and be immediately let into possession of all property "necessary for the exercise of the powers and the receipt of the "proceeds thereof, and must thereafter conduct the business of "such corporation with all its powers, privileges, and subject "to all its liabilities, until the redemption of the same as here- "inafter provided."

APPROPRIATED WATERS; WHEN A PUBLIC USE AND SUBJECT TO STATE REGULATION.

Constitution, sec. 1, art. XV, reads: "The use of all waters "now appropriated, or that may hereafter be appropriated, "for sale, rental or distribution, also of all waters originally "appropriated for private use, but which after such appropri- "ation has heretofore been, or may hereafter be, sold, rented "or distributed, is hereby declared to be a public use, and "subject to the regulation and control of the State in the "manner prescribed by law."

RIGHT TO COLLECT RATES A FRANCHISE.

Constitution, sec. 2, art. XV, reads: "The right to collect "rates or compensation or the use of water supplied to any "county, city or town, or water district, or the inhabitants "thereof, is a franchise, and cannot be exercised except by "authority of and in the manner prescribed by law."

WHAT WATERS MAY BE APPROPRIATED.

Constitution, sec. 3, art. XV, provides: "The right to "divert and appropriate the unappropriated waters of any "natural stream to beneficial uses shall never be denied."

HOW RATES FOR USE OF WATER ARE ESTABLISHED.

Constitution, sec. 6, art. XV, reads: "The Legislature shall "provide by law the manner in which reasonable maximum "rates may be established to be charged for the use of water "sold, rented or distributed for any useful or beneficial pur- "pose."

STATEHOOD CHANGED NO RIGHTS OR OBLIGATIONS THERETOFORE EXISTING.

Constitution, sec. 1, art. XXI, provides: "It is declared "that all * * * rights of individuals, and all bodies cor- "porate, shall continue as though no change had taken place "in this government."

Constitution, sec. 2, art. XXI, reads: "All laws now in force "in the territory of Idaho which are not repugnant to this "Constitution shall remain in force until they expire by their "own limitation, or be altered or repealed by the Legisla- "ture."

CITY CHARTER PROVISIONS.

COMMON COUNCIL, CONTROL OF STREETS.

Section 139 of the Special and Local Laws of Idaho, 1887, reads: "The roads, streets and alleys within said city limits "shall be under the exclusive control of said Common Council, "who shall make all needful rules in relation to the improve- "ment, repairing, grading, cleaning, etc., of the same; and "said city shall not be included in any road district in said "county."

PROVIDE FOR WATER.

Subdivision 9 of sec. 132 of Special and Local Laws, 1887, reads: "The Mayor and Common Council shall have full "power and authority, within Boise City, to provide the city "with good and wholesome water, and for the erection and "construction of such water works and reservoirs within or "without the limits of the city as may be necessary or con- "venient therefor."

Idaho Session Laws, 1897, page 88, provide: "Sec. 2. "Subdivision 9—The Mayor and Common Council of Boise "City shall have full power and authority in Boise City to "provide the city with good and wholesome water, by con- "tract or otherwise, and for the erection or construction of "such water works and reservoirs within or without the city "limits as may be necessary or convenient therefor."

Subdivision 14, page 89, reads: "To provide for the pre- "vention and removal of encroachments of, in or upon streets, "alleys, sidewalks, avenues, lanes or other highways of the "city; also for the sprinkling, cleaning and repairing of the "same at the cost of owners of abutting property."

These provisions of the charter are re-enacted in an amend- ment to the charter passed by the Legislature in 1899.

Session Laws of Idaho, 1899, page 312.

Idaho Revised Statutes, 1887, chapter 5 of title 4, entitled "Water and Canal Corporations," provides: "Sec. 2710.

"No corporation formed to supply any city or town with "water must do so unless previously authorized by an ordi- "nance of the authorities thereof, or unless it is done in con- "formity with a contract entered into between the city or town "and the corporation. Contracts so made are valid and bind- "ing in law, but do not take from the city or town the right to "regulate the rates for water, nor must any exclusive right "be granted."

"Sec. 2711. All corporations formed to supply water to "cities or towns must furnish pure, fresh water to the inhab- "itants thereof for family use, so long as the supply permits, "at reasonable rates and without distinction of person, upon "proper demand therefor; and must furnish water to the "extent of their means in case of *fire or other great necessity*, "*free of charge*. The rates to be charged for water must "be determined by commissioners to be selected as follows: " * * * *

"Sec. 2712. Any corporation created under the provisions "of this title for the purposes named in this chapter, subject "to the reasonable direction of the Board of County Com- "missioners, or city or town authorities, as to the mode and "manner of using such right of way, may use so much of the "streets, ways and alleys in any town, city or county, or any "public road therein, as may be necessary for laying pipes for "conducting water into any such town or city, or through or "into any part thereof."

ARGUMENT.

This whole contention grows out of the fact that the defendant city has, since March, 1900, claimed to be entitled to *free water for sprinkling its streets*, and, when the water company refused to furnish this unless compensation was promised, the city took it out of the water pipes, hot and cold, belonging to the company.

The city claims this *free water* by virtue of section 2711 of Revised Statutes of Idaho, which reads: "All corporations "formed to supply water to cities or towns must furnish pure,

"fresh water to the inhabitants thereof for family use, so long "as the supply permits, at reasonable rates and without dis- "tinction of person, upon proper demand therefor; *and must "furnish water to the extent of their means in case of fire or "other great necessity, free of charge.*"

The chapter from which this is quoted applies to "Water and Canal Corporations," already created and organized. It is no part of the law for the creation of such or any corporation. Private corporations are created and organized under provisions of sections 2575 to 2653 of Revised Statutes, which constitute chapter I of title IV of said volume, while section 2711 is in chapter V, same title.

Private and public corporations are the only ones known to the laws of Idaho. Sec. 2575 defines a public corporation and declares that "all other corporations are private."

The next section, 2576, provides that private corporations may be formed "by voluntary association of five or more "persons." Section 2577 provides: "Private corporations "may be formed for any purpose for which individuals may "lawfully associate themselves."

The rest of the said chapter I provides how to incorporate, how to organize, liability of stockholders and such general provisions as apply to all private corporations, organized and existing under the laws of Idaho, whatever may be the business or purposes of the corporation or whether or not it has any property or any business or ever has any property or any business.

But if it is a corporation formed to furnish water to a city, it *may* bring itself under the obligation of sec. 2711 by proceeding under secs. 2710 and 2712, so as to receive from the State, through the city government, the grant and franchise mentioned in said sections.

Sec. 2710 provides: "No corporation formed to supply "any city or town with water must do so unless previously "authorized by an ordinance of the authorities thereof, or "unless it is done in conformity with a contract entered into "between the city or town and the corporation. Contracts so "made are valid and binding in law."

Plaintiff claims that the prohibition of sec. 2710 applies to *corporations* only. And that the provision of sec. 2711 to furnish free water applies to all *such* corporations as have placed themselves under the provisions of secs. 2710 and 2712 by obtaining from the State, through the city, the franchise and grant mentioned in said sections, which are the franchise to furnish water and the grant of right to lay pipes in streets.

Plaintiff claims that the mere fact of existence and organization of its predecessor as a corporation placed it under no such obligation, and that the obligation to furnish free water does not arise until such a corporation has received, from the State through the city, the grant and privilege spoken of in sections 2710 and 2712.

Neither plaintiff nor its predecessors in interest in said water works have ever had, or asked for, or accepted or operated under any grant from State or city issued to any water company corporation.

Plaintiff and its predecessors claim and claimed to operate in the city under and by virtue of the grant and franchise given to their predecessors, the Eastmans, on October 3rd, 1889, which is as follows:

"FRANCHISES.

"An Ordinance Granting Eastman Brothers the Right to Lay "Water Pipes in Boise City.

"The Mayor and Common Council of Boise City, Idaho, "ordain:

"Section 1. H. B. Eastman and B. M. Eastman and their "successors in interest in their water works, for the supply of "mountain water to the residents of Boise City, are hereby "authorized to lay and repair their water pipes in, through "and along and across the streets and alleys of Boise City "under the surface thereof; but they shall, at all times, restore "and leave all streets and alleys in, through, along and across "which they may lay such pipes, in as good condition as they "shall find the same, and shall, at all times, promptly repair "all damage done by them or their pipes or by water escaping "therefrom.

"Sec. 2. This ordinance shall take effect from and after "its passage and approval.

"Approved October 3rd, 1889."

The applying for the passage of said ordinance, and after its passage the continuation of laying and repairing pipes, the expenditure of large sums of money upon said water works, and the improving, developing and adding to the same, constitute an acceptance of the ordinance. The rights, privileges and franchises mentioned in, or necessarily implied by the ordinance, were granted when accepted and acted upon. Upon the faith of such franchise and grant, large sums of money have been expended by the Eastmans and their successors in interest in the said water works. This grant when accepted became property, pertaining to the water works, and by its terms, and, of necessity, property, transferable with the water works properties.

The Eastmans, who applied for and obtained the passage of the ordinance, immediately continued to lay pipes, to repair the same, and to expend moneys to increase their water works system, and they and their successors in interest in these water

works have gone on under the ordinance until nearly $400,000.00 has been expended.

The act under which the city demands free water for sprinkling purposes was passed in 1887. The ordinance asked for by the Eastmans and granted, was passed and approved October 3rd, 1889.

It is not questioned but what said ordinance was within the power of the city under its charter to ordain.

The Eastmans operated the water works, supplied water to the inhabitants of the city and collected rates for same down to June, 1890, when the Boise Water Works Company was formed, a private corporation organized and existing under the general laws of Idaho. (Chapter I, title IV, Revised Statutes.) This corporation purchased and took possession of the said water works and all the properties connected therewith, including all franchises, rights and privileges, and was the successor in interest of said Eastmans, in and to their said water works, and in said grant and franchise from said city, and assumed, as such successor, all the duties and liabilities appertaining to said water works and to said franchise in the hands of said Eastmans, and was by all persons recognized as such successor with such duties and liabilities.

On the 28th day of March, 1891, the Artesian Hot & Cold Water Company, Limited, was formed and organized and it afterwards became and was the successor of the said Boise Water Works Company and of the said Eastmans in and to the said water works and the said grant and franchise made to said Eastmans by said city, and was so known and recognized by all persons and acted as such down to August 28th,

1901, and assumed all the duties and liabilities pertaining to said water works and said grant and franchise. It owned all said properties, rights, franchises and privileges, and operated the same as such successor down to August 28th, 1901. Said corporation dealt with the defendant, supplied water to defendant, for compensation agreed upon, for various purposes, including water furnished for street sprinkling so far as any was furnished the city prior to March, 1900, and furnished no free water for any purpose.

That for the years 1897, 1898 and 1899, it entered into contracts with the city to furnish water for street sprinkling purposes, by the terms of which it was obligated to, and did, increase the size of its water mains, erect stand pipes and enlarge its pumping plant, thereby incurring an expense of over $20,000 in order to furnish the city water for street sprinkling.

In March, 1900, the city refused to contract for water for such street sprinkling purposes, refused to pay or promise to pay for same, and on April 19th, 1900, unknown to the water company and unasked for by it, the city passed an ordinance pretending to grant to the water company the right to lay pipes in the streets, and demanding free water for street sprinkling. The company immediately served notice on the city that it had not asked for, did not need or desire such franchise, and would not accept it, and that it considered the same as illegal and void.

Thereupon and thereafter the city took said waters as set forth in the complaint, continuously, during sprinkling seasons, by claim of right so to do, and without paying therefor, down to the time of filing complaint herein.

Had the city the right to *free water for street sprinkling* purposes from the said water works, at any time? We concede that if it had at any time, it had at all times.

One Peter Sonna, an individual, has and had a system of water works in the city, and supplies and supplied eight blocks of the city with water, and from his system no water was taken for street sprinkling, or was demanded.

Others also furnished water to the inhabitants of the city, and they, and said Sonna, are competitors with the plaintiff, and were with its predecessors, in the business of furnishing water to the inhabitants of the city. None of these competitors were required to furnish water for street sprinkling, or did furnish it, but the waters of plaintiff's water wroks, and of its predecessor, while owned by it, were taken by the city, and used upon streets sprinkled, and a large portion used in blocks and parts of the city where plaintiff does not, and its predecessor did not, supply the inhabitants thereof with water and where the said Sonna does and did. The date of the ordinance and grant by the city to said Sonna was May 24th, 1894, and in 1890, one A. D. Foot was also granted like right and privilege of laying water pipes in the city.

If the city has the power and exercises the right of compelling the plaintiff to furnish water for street sprinkling purposes, *free of charge*, while others under grants like the one made to the Eastmans, who are in direct competition with plaintiff, furnish water to the inhabitants for compensation and are not required to furnish free water, the value of plaintiff's property rights and franchises will be necessarily greatly impaired, if not absolutely destroyed.

Had the Eastmans continued to hold the water works property and the rights, privileges and benefits ordained by the

city on their request on October 3rd, 1889, and to operate the water works continuously from the time such ordinance was passed to present time, and gone on with the improving, enlarging, extending thereof, until the water works were as now, of the value of about $400,000, there is no question but what they would stand as does Mr. Sonna, and as would any individual, or individuals, and that is, stand independent of any obligation to furnish free water. They would then be subject to regulation as to rates, because of the nature of their business. But, because not a corporation, there would be no claim on them for *free water* for any purpose.

We quote from opinion of Messrs. Dickson & Ellis, furnished plaintiff on this question, as follows:

"The granting of this franchise to the Eastmans by the "city, and their acceptance of it, constituted a contract be- "tween them and the city—a contract to which certain implied "obligations and rights attached and which measures the "rights, privileges and liabilities of the Eastmans in the exer- "cise of what was granted them and in the operation of said "water works for such public purposes.

"The Eastmans necessarily took this franchise, when they "accepted it, with the implied obligation, and promised that "they would furnish 'mountain water' to the extent of their "means to the city and its inhabitants, at reasonable rates "and without discrimination, and they received it with the "correlative implied right to charge and collect reasonable "and uniform rates for water furnished the city and its inhab- "itants.

"This obligation to furnish water at reasonable and uniform "rates and the right of the Eastmans to receive payment "therefor arise by *necessary implication* out of the grant.

"The obligation is necessary for the protection of the public "and it is one which always is implied and understood on the "acceptance of such a grant, and on the other hand the grant "itself would be valueless and meaningless if it did not carry

"with it the right in the Eastmans to demand and receive rea-
"sonable compensation for water furnished by them there-
"under.

"While neither the obligation nor the right nor privilege is
"expressed in terms in the grant, yet, being *necessarily implied*
"*from the grant*, they are as much a part of the contract be-
"tween the city and the Eastmans as though written into the
"grant in most explicit terms. When parties have entered
"into a written contract, whatever obligation, liabilty, prom-
"ise or undertaking which the law will impose upon, or charge
"the parties with, when the language used is to be interpreted,
"is as much a part of the contract as though the implied obli-
"gation, liability, promise or undertaking had been written
"into the contract in express words.

"As said by Judge Wilson in Roberts vs. Kneeland, 10
"Wend. 250: 'It is a general principle applicable to all in-
" 'struments or agreements, that, whatever may be fairly im-
" 'plied from the terms or language of an instrument, is in
" 'judgment of law contained in it.'

"This is quoted with approval in Hutchinson vs. Lord, 60
"Am. Dec. 381.

"In Fawkner vs. Smith Wall Paper Company (88 Iowa),
"45 Am. St. Rep. 230, it is said, on page 232: 'Another
" 'thing must be borne in mind in determining as to whether
" 'or not the written contract is such that it can be varied
" 'by parol evidence, and that is the *law raises certain impli-*
" '*cation from the terms used in the contract, and whatever*
" '*the law thus implies, from the language used in the writing,*
" '*is as much a part of the contract as that which is expressed*
" '*therein.*'

"In Morgan vs. Dribble (29 Texas), 94 Am. Dec. 264, the
"doctrine is announced: 'Contracts impose upon parties not
" 'merely obligations expressed in them, but everything which
" 'by *law*, *equity* and *custom* is considered incidental to the
" 'particular contract, or necessary to carry it into effect.'

"In United States vs. Babbitt, 1 Black, (U. S.) 55, it is said
"on page 61, 'What is implied in a statute, pleading, contract,
" 'or will, is as much a part of it as what is expressed.' "

"In Louisville R. R. Company vs. Wilson, 4 Lawyers' "Reps. Annotated, 244, it is said, on page 246: 'In the absence " 'of express stipulation, certain terms are annexed to every " 'contract by legal implication, and stipulations thus imported " 'into a contract become as effectually a part of the written " 'agreement as though they were expressed therein in terms.'

"In Bancroft vs. San Francisco Tool Company, 47 Pac. "684, it is said, on page 686: 'The contention of appellant " 'is that the warranty implied by law * * * is a part " 'of the written contract. In other words, the contention is " 'that *what is by the law implied* in an express contract is as " 'much a part of it as what is expressed. We think the con- " 'tention is founded on firm basis.'

"And the Court quotes from 1 Beach Mod. Cont., sec. 710, "these words: 'What is implied in a contract is as much a " 'part of it as what is expressed.'"

> State vs. Laclede Gaslight Co. (102 Mo.), 22 Am. St. Rept. 789. On page 795 this point is well illustrated.

The ordinance itself shows why it was ordained. It was "for the supply of mountain water to the residents of Boise "City"—not river water or impure water or water of lake or pond, but mountain water. The city had no power to grant to the Eastmans or to any person the use of its streets for laying of water pipes for private purposes merely, but only to serve some public purpose, such as the supplying of the city and its inhabitants with water.

When the Eastmans accepted this grant they agreed to what, by the law and custom in such regard, was necessarily implied, and the city on its part agreed that they might and must furnish such mountain water at reasonable rates, without discrimination, to extent of their means, to its inhabitants for reasonable compensation or rates.

By acceptance and going forward with the water works, this ordinance became a contract, and would, even if it had been a mere license at first, have become on acceptance and the expenditure of money in the laying of pipes, a binding contract. In the hands of the Eastmans and of their successors it became an irrevocable grant—a property right enetring into and becoming an inseparable part of the water works properties.

Reading the grant in the light of these implied obligations, rights and privileges, it is entirely clear that under it the city would have no right whatever to have demanded from the Eastmans free water for any purpose, and had the city assumed to take from the Eastmans, without payment therefor, water for municipal purposes, it would thereby not only have violated its grant, but would have been guilty of taking private property for public use without compensation, in violation of the fundamental law of the land.

As we have interpreted this grant, and, as we think, it was in fact and by necessary implication, so was it interpreted by both the parties herein for over ten years, while the water works were in the hands of the Eastmans, and also at all times while owned and operated by their successors down to March, 1900, as shown by the contracts made by the city with the owners of the water works, and as shown by a course of continual dealings from 1889 down to time when city attempted to repudiate this grant by ordinance 304 on April 19th, 1900, when first it proceeded to act as if the water company was without any rights to act as such in the city, and, on such assumption, to pass the said ordinance giving it such rights and demanding free water. This ordinance 304 was not to give the water company any franchise or right, but was

ordained by the city in order to place the water company under the obligation of said sec. 2711; not granted on request of the water company, but made, no doubt, on advice of attorneys. It pretends to give a right in order to be able to demand free water. It was the city's way to give to itself the property of another free of charge.

The city takes the position that the grant to the Eastmans was, and after acceptance, remained, a mere license, to be withdrawn at any time at the option of the city.

The plaintiff insists that after acceptance and the expenditure of so much money it became a binding contract and a property right appertaining to the water works properties.

When the grant to the Eastmans came to the Artesian Hot & Cold Water Company, Limited, the immediate predecessor of plaintiff, it came to a "successor in interest in their water "works" by purchase of all the properties and by assignment of this grant, and that company took and received it with the same rights and privileges which attached to it in the hands of the Eastmans, and charged with no burden other than those which were imposed upon it while it was held by the Eastmans.

The city seems to take the ground that by reason of the fact that the Artesian Hot & Cold Water Company, Limited, was a corporation formed to supply water to a city, that, on being organized, it must do so by the law of its existence. It must do so whether it ever had any property or not.

Plaintiff takes the positon that these corporations are created and organized and exist under and by virtue of chap. 1 of title IV, and may, and at first do, exist without any property, or any grant, or any franchise, or any power, or any obligation whatever. When such a corporation secures from

the State, either directly or through a city, as part of State, such grant and franchise as are mentioned in said secs. 2710 and 2712, then it might be held to take it subject to the burden imposed by sec. 2711. Its mere existence imposes no burden, and is consistent with its having no property and no powers. No power no duty. After it exists, and is organized, it may or it may not obtain property, and power, and have duties. If after its existence it goes to the State, or to such portion of the State as is called a city, and obtains the franchise spoken of in sec. 2710 and the privilege spoken of in sec. 2712, then, being a person of such nature as is mentioned therein, it takes these franchises and privileges subject to the obligation mentioned in sec. 2711.

Such corporate person is only subject to the burden of furnishing free water imposed by sec. 2711, when it has secured the rights, franchises and privileges from the State, or city as its representative, mentioned in secs. 2710 and 2712.

Such corporate person has by the law under which it exists and by its charter the right and the power to *acquire property* and to purchase water works and their properties, and the right to purchase the water pipes and to purchase the rights, privileges, franchises and everything in nature of property connected therewith, the same as any other person, and these properties do not change their nature or relation by such sale and purchase, but are the same in hands of grantee as in hands of grantor, without respect to the nature of the purchasing person.

This turns upon the question as to whether such grant is or is not property subject to sale and transfer as other property.

City of Quincy vs. Bull et al., 106 Ill. 4 Am. & Eng. Corp. Cas., 554.

The West River Bridge Company vs. Dix et al., 6 Howard 507, Lawyers' Co-op. Ed. Book 12, page 535. In this case it appears that the State of Vermont had granted to a private corporation not only its charter of existence, but with it a franchise to erect and maintain a bridge and charge and collect tolls for passage over it. Afterwards a law was passed under which the bridge and toll road were taken for a public road under the power of eminent domain.

Mr. Webster and Mr. Collomer represented the bridge company. They claimed that it was no exercise of the power of eminent domain as an incident of sovereignty—the taking of private property for public use—but was, in truth and fact, the impairing of the obligation of the contract.

That this was attempted to be effected under the disguise of calling the grant and franchise *property*, when, in fact, it was not property in any such sense as placed it within the power of eminent domain, but "was a franchise, a pure fran-"chise."

In the opinion Mr. Justice Daniel says (page 546, Co-op. ed.): "We are aware of nothing peculiar to a franchise w-"can class it higher, or render it more sacred, than other prop-"erty. A franchise is property and nothing more; it is incor-"poreal property and is so defined by *Justice Blackstone* when "treating in his second volume, chapter 3, page 20, of the "Rights of Things. It is its character of property only which "imparts to it value, and alone authorized in individuals a "right of action for invasions or disturbances of its enjoy-"ment." And in the same case Mr. *Justice McLean*, in his opinion (page 547, Co-op. Ed.), says: "If the action of the "State had been upon the franchise only, this objection would "be unanswerable. The State cannot modify or repeal a "charter for a bridge, a turnpike road, or a bank or any other "private charter, unless the power to do so has been reserved "in the original grant. But no one doubts the power of the

"State to take a banking house for public use of any other "real or personal property owned by the bank. In this respect "a corporation holds property subject to the eminent domain, "the same as citizens. The great object of an incorporation "is to enable a body of men to exercise the faculties of an "individual. * * *

"The franchise no more than a grant for land can be "annulled by the State. These muniments of right are alike "protected. But the property held under both is held subject "to a public necessity to be determiend by the State. In "either case the property being taken renders valueless the "evidence of the right. But this does not in the sense of the "Constitution impair the contracts.

"The bridge and the ground connected with it, *together "with the right of exacting toll*, are the elements which con- "stitute the value of the bridge. The situation and produc- "tiveness of the soil constitute the value of the land. In both "cases an estimate is made of the values under prescribed "forms, and it is paid when the property is taken for a public "use. And in these cases the evidences of right are incidents "of the property. * * *

"It is objected that this bridge, being owned by a corpora- "tion and used by the public, does not come within the desig- "nation of *private property*. All property, whether owned "by an individual or individuals, a corporation, aggregate or "sole, is within the term. In short, all property not public "is private."

In the same case, Mr. *Justice Woodbury* (page 549, Co-op. Ed.) says: "I concur in the views, that a corporation created "to build a bridge like that of plaintiff's in error, is itself "in one sense a franchise. * * * And in another sense, "that it *possesses franchises* incident to its existence and ob- "jects, such as powers to erect the bridgs and take tolls. I "concur in the views, also, that such a franchise as the incor- "poration is a species of property. * * * It is a legal "estate vested in the corporation. But it is often property "distinct and independent of the other property in land, tim- "ber, goods or choses in action, which a corporation, like a "body not artificial, may own. It is property subject to be "sold sometimes even on execution, and may be devised or

"inherited. And, while I accede to the principle urged by "counsel for the bridge, that the act of incorporation in this "case was a contract, or in the nature of one between the "State and its members, * * * I concur in the views of "the Court that this or other property of the corporation may "be taken for the purpose of a highway under the right of "eminent domain."

The learned Judges give many reasons and bring forward many analogies to sustain the decision that the bridge and the *franchise to take toll may*, like other property, and *because property*, be taken by right of eminent domain in the State for a purely public use, such as a free highway. It seems to us that this early case shows that the learned Judges *felt* the distinction between a franchise of existence and a secondary franchise conferring powers and privileges like that of taking toll, but yet did not clearly make the distinction. Later cases do this, and the difference between a *corporate franchise* and the franchise of a corporation has now been often distinguished.

The Artesian Hot & Cold Water Company, Limited, the immediate predecessor of plaintiff, at first had corporate existence and was organized as a private corporation, then it had no property, had no franchise to furnish water, or to collect rates, had no rights or privileges in the city, no powers and no duties relating to water works—had no water works. But it was an artificial person by reason of a *corporate* franchise really owned by its members, and was such an artificial person as had the right and power to purchase water works, and all that pertained thereto, as rights, privileges and property inseparably connected therewith, and entering into the same as one factor of the value of the property.

Mich. Tel. Co. vs. St. Joseph, 121 Mich. 502. 80 N. W. 383. 80 Am. St. Rep. 520

It could purchase whatever was *property* relating to or entering into a system of water works because it was incorporated to own and operate that class of property. A secondary franchise to furnish water to the inhabitants of a city belonged to that class of property. A right to lay and repair water pipes in the streets of a city was also of that class of property.

Such a franchise is intangible property, worth nothing except in connection with tangible property, and the tangible property is but old iron and dead water except for the franchise. Such a franchise is taxable. In Detroit Citizens Street R. Co. vs. Common Council of Detroit, 125 Mich. 673, 85 N. W. 96, and 84 Am. St. Rep. 589, the Court divides franchises into three classes: First, the right to organize and exist; second, the right to act generally, and third, the special privileges which are not possessed by persons under general laws, and says: "The right to exist and act generally (first "and second classes) are not transferable, have no cash value "and are not taxable; but special privileges granted to a cor- "poration or to any person may have a cash value in connec- "tion with tangible property and be taxable."

In this case the different kinds of franchises are distinguished, and franchises of the nature the city granted to the Eastmans are held taxable under general law to tax property, because they are property and are transferable as such. Speaking of such grant, the Court says (84 Am. St. Rep. p. 595): "Special privileges, unlike the right of corporate existence, "have an actual value in connection with the property adapted "to their use and are salable with it." (See Joy vs. Plank "Road Co., 11 Mich. 164.)" This case in 11 Michigan, cited by the Court, discusses many points in question here. On page 164 the Court says: "On the argument of this "cause, this question, so far as it relates to the franchises of "the corporation, was treated as if all the rights and powers

"conferred by the charter constituted but one entire franchise, "which in its nature must be indivisible, no part of which could "be assigned or mortgaged without the whole. I do not think "this is the true view of the subject. But all the several "rights and powers conferred by the charter may, I think, "be treated as so many different franchises, some of which are "essential to the existence of the corporation, while others are "not. Those which are essentially *corporate* franchises, with- "out which the corporation could not exist, and which are, in "their nature, incapable of being vested in, or enjoyed by, a "natural person—such as the right or franchise of being a "corporation, of having corporate succession, etc.—cannot be "made the subject of sale or transfer, without a positive "provision of statute, giving the authority and pointing out "some mode in which such transfer may be effected: as this "would be allowing the corporation 'to transfer its corporate " 'existence into another body'—to create a new corporation, "which is an act of sovereign power only to be performed by "the Legislature." And on page 165, the Court says: "As "a general rule, corporations may, I think, be said to have an "incidental power to dispose of their property, real and per- "sonal, either by sale absolute, or by mortgage or other mode "of security, for any debt which they may rightfully contract, "to the same extent as natural persons, except so far as that "power may be restrained by their charter, by considerations "connected with the purposes of their creation, or limited by "express provision or just implication of some statute, or by "the general policy of the State to be deduced from its legis- "lation." And the Court quotes with approval from Pierce on Railroads as follows: "The proposition that a corpora- "tion cannot perform acts as to its property which will disable "it from performing its public duty, if admitted at all, must "be confined to very limited operations; so limited as to make "the proposition itself doubtful." And on page 168 the Court says: "If the State had adopted a policy calculated to "prohibit, or had failed to provide for, a sale on execution, "of the franchise of taking tolls against plank roads and simi- "lar corporations, this would be a strong argument against the "power to dispose of the same by mortgage; but if the State "has waived, for the benefit of creditors, the injury which "might result to the public by a transfer under execution, "in the absence of any prohibition against mortgaging, I am

"at a loss to discover upon what ground it can be held that "a mortgage of the same property should not be held valid "and to authorize a sale to the same extent." This opinion of the Court is by Judge Christiancy, and in a concurring opinion Judge Campbell says: "It is true that no franchise "that the law entrusts to the discretion of specific legal bodies "can be exercised by any other person in violation of that "trust. But it does not follow, because a certain authority "is vested in a corporation, that its delegation must always "amount to such a violation of trust. No corporation, for "business purposes, was ever created which did not require "a considerable portion of its affairs to be transacted by agents "who are not corporate officers." And after discussion and illustration says, on page 176, "that what this company could "authorize to be done or managed by separate agents for cor-"porate benefit might be mortgaged."

The word franchise is used in so many senses that it has in this respect little meaning unless it is known what is referred to. If the difference between a corporate franchise and a franchise of a corporation was always kept in mind it would avoid much confusion. It is like the old example of distinction, once used to cultivate the child mind—the difference between a salt box and a box of salt.

City of Quincy vs. Bull et al., 106 Ill. 337, 4 Am. and Eng. Corporation Cases, p. 554.

In this case the Court held that the city had power to grant use of its streets to lay water pipes under general powers of control of the streets, and having granted this, the Court says (p. 565, 4 Am. and Eng. Corporation Cases): "This privi-"lege of use of streets by Prince is not a mere license, revoca-"ble at pleasure of the City Council, but it is a grant under "an express contract for adequate consideration received and "binding as such."

In that case the city had simply given permission to lay the pipes in the streets for the purpose of supplying water

to the inhabitants. But the Court held the public benefit was a consideration for the contract which was made and accepted by the work having been done. It is the rule of Common Law that franchises cannot be seized and sold on execution, for two reasons: First, because intangible, and second is that, where franchises are granted for the furtherance of public purposes, creditors are not to be allowed to so enforce their claims as to prevent the corporation from fulfilling its public duties. While this doctrine has been widely accepted as correct, it does not apply to such property of the corporation as is not essential to the performance of those duties; nor does it apply to franchises or properties of corporations which owe duties to the public, no other than would an individual in like business.

Girard Storage Co. vs. Southwork Co. 105 Pa. St. 250.

In this case it was claimed that a mechanic's lien could not be placed upon and enforced against the property because it was property dedicated to a public use. The Court distinguishes between a public use and a quasi-public property. Calls attention to the fact that the only thing that the corporation had received from the State was its franchise of existence and power to act and do business, and that because it dedicated certain property to a public use the property was not public, and the public had no interest in it and could only regulate its use. And the Court illustrated its position by an interpretation of the Munn vs. Illinois case (94 U. S. 113, Law. Ed., Book 24, p. 77), and the Court says: "Nor can "we understand how the case of Munn vs. Illinois, 4 Otto, "113, can affect the case in hand. The question there involved "not the rights of a corporation but those of a private person, "and the principle involved in the ruling of the Supreme

"Court of the United States was that where the owner of such "property as a warehouse, devotes it to a use in which the "public has an interest, he, i neffect, grants to the public an "interest in such use and must therefore, to the extent thereof, "submit to be controlled by the public for the common good "as long as he maintains that use, but he may at any time "withdraw his thus implied grant by discontinuing the busi- "ness from which it arises. But it certainly does not follow "that because of this public interest, the property of a private "person is made public property, or even quasi-public prop- "erty, or that it is therefore exempt from ordinary execution process."

This case at bar must be distinguished from a class of cases—mostly railway cases—where corporations are held to have no power to dispose of franchises and property necessary to the performance of duties they owe to the public. This class of cases is described by Justice Miller in Thompson vs. West Jersey R. R. Co., 101 U. S., 71, as follows The learned Judge says: "That principle is, that where a "corporation, like a railroad company, has granted to it by "charter a franchise intended in a large measure to be exer- "cised for the public good, the due performance of those func- "tions being the consideration of the public grant, any con- "tract which disables the corporation from performing those "functions which it undertakes without the consent of the "State, to transfer to others the rights and powers conferred "by the charter, and to relieve the grantees of the burden "which it imposes, is a violation of a contract with the State, "and is void as against public policy. This doctrine is as- "serted with remarkable clearness in the opinion of this court, "delivered by Mr. Justice Campbell, i nthe case of R. R. R. "Co. vs. Winnans, 17 How. 30 (58 U. S. 27). The cor- "poration in that case was chartered to build and maintain "a railroad in Pennsylvania by the legislature of that state. "The stock in it was taken by a Maryland corporation, call- "ed the Baltimore and Susquehanna Railroad Company, and "the entire management of the road was committed to the "Maryland Company, which appointed all the officers and "agents upon it, and furnished the rolling stock. In refer-

"ence to this state of things and its effect upon the liability of "the Pennsylvania corporation for infringing a patent of the "defendant in error, Winnans, this Court said: 'This conclu- "sion (argument) implies that the duties imposed upon plain- "tiff (in error) by the charter are fulfilled by the constitution "of the road and that by alienating its right to use and its "powers of control and supervision, it may avoid further res- "ponsibility. But these acts involve an overturn of the rela- "tion which the charter has arranged between the legislature "and the community. Important franchises were conferred "upon the corporation to enable it to provide facilities for "communication and intercourse, required for public conven- "ience. Corporate management and contral over these were "prescribed and corporate responsibility for their insufficiency "provided as a remuneration for their grant. The corpora- "tion cannot absolve itself from the performance of its obli- "gation wit hthe consent of the Legislature."

We have cited and quoted from the above where it held that certain corporate rights, corporate franchises and corporate properties *could not be sold or transferred,* in order to the better distinguish between that class of ca ses and the clas s to which this case at bar belongs. In those cases the corporatiomn had been created to do a specific thing, had received franchises on promise to do that thing, and corporate control and corporate management had been prescribed, and corporate responsibility required by the State, and, undertaken by the members of the corporation, to obtain their grant. Here there has been no attempt to transfer anything granted by any charter. There is here no grant from the State connected with any charter except the right to do business and to act as a corporate company. No rights or powers have been attempted to be transferred which were granted to the Artesian Hot & Cold Water Company, Limited, by its charter, or granted to it, or to any corporation, in any manner, or by any gov-

ernmental power. No attempt to relieve the said company of any burden imposed by its charter, no attempt to violate any contract express or implied, it had with the State. The sale to plaintiff did not affect its existence, did not take from it or in any way effect its right, or power, to do business, but left it as it was when it first became a corporation, and as powerful, and as free t oact, as a water company, as it was when first organized; it was as free to purchase the Sonna system of water works and pipes, with the like franchise to lay pipes in the streets of the city, as it was to purchase the Eastman system, or it could havee purchased the efranchise granted to Foot and others, and laid new pipes or it could buy back from plaintiff all it had sold. If it was the State acting through the city that made the Eastman grant, then that grant was by its terms transferrable to "their successors in interest in their said water works."

Is case at bar not to be distinguished from one where a railroad company, chartered to build a particular road and given powers and privileges in its charter as its corporate franchises, does build it, and then attempts to sell or lease it? Such corporation cannot sell or lease the road and franchises without ceasing to have the power to perform the function for which it was created. The question whether right of way and franchise granted by a city to operate a railway may be transferred and the question of when it is not against the public policy of a state are aptly illustrated in the case of the New Orleanse Spanish Fort etc., R. R. vs Delamore, 114 U. S. 501, Law Ed., Book 29, p. 244. The Supreme Court held that the franchise granted by the city of New Orleans, giving right of way to build and use track for railway purposes wholly within the city might be transferred without the con-

sent of the city, and on the ground that such franchises were part of the tangible property, and that the property could be mortgaged and therefore sold in any manner; and that because as it could be in one manner, and that manner on execution sale, that therefore it was not against the public policy of the State that such franchises be sold. Now as the laws of Idaho provide for sale of all franchises on execution, it is equally not against the public policy of the State that such franchises be otherwise sold. Sec. 2642 of Revised Statute of Idaho provides "For the satisfaction of any judgment "against a corporation authorized to receive tolls, its fran- "chises and all the rights and privileges thereof may be levied "upon and sold under execution in the same manner and wi. "like effect as any other property."

State vs. Western Irrigation Canal Co., 40 Kan 96.
S. C. 10 Am. St. Rep. 166.
Miners Ditch Co. vs. Zellerbach., 37 Cal. 543.
Willamette Woolen Mfg. Co. vs. Bank of Brit. Col 119 U. S. 191. L. Ed. 30, 384.
Coe vs. Columbus etc. R. R. Co. 10 Ohio St. 372.
S. C. 75 Am. Dec. 518.
Bardstown and Louisville R. R. Co. vs. Metcalfe, 4 Metcalfe (Ky.) 199. Same case 81 Am. Dec 541.
Detroit vs. Mutual Gal Light Co., 43 Mich 594.
State ex rel. Goddard Atty. Gen'l. vs. Topeka Water Company, decided March 10, 1900, found in Vol. 12 (New Series) Am. & English Corporation Cases 250; 60 Pac. 337.

In the above water cases many of the questions raised by the respondent here were disposed of by the Court:—including right to sell secondary franchises with tangible property and

right of foreign corporation to purchase, hold and exercise the same.

So distinct and different is teh franchise to lay pipes in the streets of a city, for furnishing water to its inhabitants, from such franchises as are corporate and came from the State, that in Michigan where, as in Idaho, the formation of a corporation is under the general state, and the right t olay pipes in the streets of a city for the purpose of furnishing gas to the inhabitants is from the city, that the Supreme Courts of Michigan, composed of Cooley, Campbell, Marston and Graves, decided that such a franchise is not a State franchise but a local easement resting on contract or ordinance of the city and as it comes not under State law or State policy, and is a matter in which the State has no interest and that *quo warranto* does not lie for any violations of contract or ordinance, or for such exercise without authority from the city.

The People *ex rel* W. C. Mabury, vs. Mutual Gas Light Company of Detroit, 38 Mich. 154.

Attorney General vs. Railway Company, 96 Mich., 65

In this latter case, under a statute providing that an information in nature of *quo warranto* would lie "whenever any corporate body shall exercise any franchise or privilege not conferred upon it by law." Court held it was not a State franchise but a mere grant of authority, which, whether coming from privatee owners or public agents, rests in contract or license and in no way concerned the State, and this in a case where it was claimed a street railway company was exercising the franchise of maintaining its tracks and operating its road in the streets of a town.

To same effect People vs. Railway Co., 92 Mich. 522.

In Idaho, as in Michigan, the right to lay pipes in the streets is not granted directly by the State but by the city under power given it by the State. And such grant is a contract protected by the Constitution of the United States.

New Orleans Gas Co., vs. Louisianna, 115 U. S. 650. (Law Ed., Book 29, p. 516.)

New Orleans Water Works Co., vs. Rivers, 115 U. S. 674. (Law Ed. Book 29, p. 525.)

Atlantic City Water Works vs. Atlantic City, 39 N. J., Eq. 367; 10 Am. and Eng. Corporation Cases, 59.

City of Quincy, vs. Bull, 106 Ill. 337. 4 Am. and Eng. Corp. Cases, 554.

The court says: "By the 11th Section," (of the ordinance) "the right of way is granted to him in all the streets and al-"leys of the city for the purpose of laying pipes and mains "and sewers, etc. * * * The ordinance and the accep-"tance of it by Prince constituted a contract between him and "the city of Quincy." * * * "This privilege of the use of "the streets is not a mere license revocable at pleasure of the "city, but it is a grant under express contract for an ade-"quate consideration." The consideration was the xpenditure of money by the grantee and the putting in of water works which are a public good.

Williams vs. Mutual Gas Company, 4 Am. and Eng. Corp. Cases 66.

Here the court held that "There rights and privileges were "granted that corresponding duties and benefits might inure "to the citizens when the rights and privileges conferred "should be exercised." The Eastmans and successors as long as they exercise the privileges granted by the ordinance and lay and maintain pipes in the streets for furnishing of water, must furnish good water, and to every inhabitant and person

on demand without distinction or discrimination. This obligation was by necessary implication a part of the contract with the city undertaken by their acceptance of the grant.

Derby Turnpike Co. vs. Parks, 10 Conn. 522; 27 Am. Dec. 700.

This case holds such a grant as was given to Eastmans is a contract irrevocable and no consideration necessary because it was an executed grant.

Hudson Tel. Co., vs. ersey City 49 N. J. L. 303, 60 Am. Rep. 619.

This case holds that the telephone company had an irrevocable right to the use of the streets for its poles after permission given, accepted and money expended by the company. Had the Common Council of the city power to revoke such permit, it could convert the property of the company to the character of a nuisance.

Board of Mayor etc. of Morristown vs. East Tenn. Tel. Co., 115 Fed. 304.

On page 307 the court says: "The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and the conveyance of a nestate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to revoke or alter was reserved. This principle has too many times been declared and applied by this court to require further elaboration. Detroit Citizen's Street Railway Co., vs. City of Detroit, 12 C. C. A. 365, 64 Fed. 628; Louisville Trust Co. vs. City of Cincinnati, 76 Fed. 296; Iron Mountain R. Co. vs. City of Memphis, 37 C. C.

"A. 416, 96 Fed. 113; Citizens Ry. Co. vs. Africa, 23 C. C. A. "252, 77 Fed. 501."

New York vs. Second Avenue R. R. Co., 32 N. Y. 272.
Mayor etc, of Huston vs. Huston City Street R. R. Co. 83 Tex. 548, 29 Am. St. Rep. 679.

Grant of use of street for street R. R. purposes when accepted and acted upon is irrevocable and a vested right.

People vs. Obrien, 111 N. Y. 1; 7 Am. St. Rep. 684.

This case holds, under laws similar to Idaho, on this subject, that, "An interest in the streets of New York City may be "granted in perpetuity and irrevocably, by the city authorities. "Grant of franchise to construct a street railway will be con- "strued as an irrevocable grant in perpetuity, though the cor- "poration to which it was granted was created for a limited "period only. Franchise to construct and maintain a street "railway is not a mere license or privilege enjoyable only dur- "ing the life of the grantee, and revocable at the will of the "State. It has been uniformly regarded as indestructible by "legislative authority, and as constituting property in the "highest sense of the term. Reservation of the right to repeal "the charter of a corporation enables a legislature to effect a de- "struction o the corporate life, and disable it from continuing "the corporate business; but personal and real property ac- "quired by the corporation during its lawful existence, rights "of contract or choses in action so acquired, and which do not "in their general nature depend upon the powers conferred by "the charter, are not destroyed by such repeal. Franchise to "construct and maintain a street railway survives the dissolu- "tion of the corporation grantee, resulting from the repeal of "its charter and enacted pursuant to a right of repeal reserved "by the legislature. Statute atempting to take from the Broad- "way Surface Company, its stockholders and creditors, its "franchises and property, and bestow them upon the munici- "pality of New York, or to direct a sale of such franchise, "and the payment of the purchase price to such city, is uncon- "stitutional, and therefore void." This case covers many of the

points here to be considered and the notes to the case, found on pages 720 to 726 are also a most important brief on the whole subject.

Town of Arcata vs. Arcata & M. R. R. Co., decided by the Supreme Court of California in 1892, reported in 28 Pac. 676, in which the court says: "There is no merit in the contention "that the order of March 9, 1885, was a mere license revoca- "ble at the pleasure of the board. After the defendant had "acted upon the terms of the order, and expended money "in the construction of the road, the board could not rescind "or recall the privilege it had granted, unless the company "failed to comply with the terms or conditions of the grant."

The nature of the franchise granted to the Eastmans is such that, in our opinion, had it been granted by the city to the plaintiff company, or to any other corporation formed for the purpose of owning and conducting the said systems of water works in said city, still it could, like any other property, be sold and transferred, as a property right belonging to and inseparable from the tangible property, and that such grant, or privilege, or easement is amalgamated with the tangible property and exists and can be transferred independent of the nature of the person owning the property and is unlimited by the life of the corporation owning it as really as by the life of the Eastmans. Such a secondary franchise must be distinguished from the kind of secondary franchises often issued by a State to a railroad company, as a part of its charter. This railway company class of so-called secondary franchises is described in Commonwealth vs. Smith, 10 Allen, 448; 87 Am. Dec. 674, where the Court says: "The general power "to dispose of and alienate its property is also incidental to "every corporation not restricted in this respect by express "legislation or by 'the purposes for which it is created, and "'the nature of the duties and liabilities imposed by its char-

"'ter.' Treadwell vs. Salisbury Mfg. Co., 7 Gray, 393. "(66 Am. Dec. 490.) But in the case of a railroad com- "pany, created for the express and sole purpose of construct- "ing, owning and managing a railroad; authorized to take "land for this public purpose under the right of eminent do- "main, whose powers are to be exercised by officers expressly "designated by statute; having public duties, the discharge of "which is the leading object of its creation; required to make "returns to the Legislature—there are certainly great, and, in "our opinion, insuperable objections to the doctrine that its "franchise can be alienated, and its powers and privileges con- "ferred by its own act upon another person or body, without "authority other than that derived from the fact of its own "incorporation."

Such is the nature of a class of secondary franchises that cannot be transferred. In no respect does the grant to the Eastmans resemble them.

We admit that the grant to the Eastmans, or any such grant, of use of streets of a city to any person or corporation is, *when granted*, a mere license, and until the grantee has availed himself of the privilege, and has laid pipes, been to expense and thus accepted the grant, it can be recalled, but after acceptance and the expenditure of moneys on the faith of it, it becomes in the nature of a contract, is a vested right, enters into and makes valuable the tangible property, which, if it was revoked, would be almost worthless.

Port of Mobile vs. Louisville & N. R Co., 84 Ala. 115: 5 Am. State Rep. 342.

In this case, speaking of an ordinance allowing use of streets for track for operating railway within the city, the Court says: "The privilege thus granted is thus obviously "a franchise of the most valuable kind, being one of the most "common examples of such a grant or privilege. Davis vs. "Mayor, 14 N. Y. 506; 67 Am. Dec. 186, 193. It is cer-

"tainly a 'right, privilege or franchise' within the meaning "of the company's charter, having reference, as it does, to the "construction and management of the railroad and the con- "duct of its business of transportation within the limits of "the city of Mobile. Such a special privilege conferred di- "rectly by legislative enactment, or in a mode provided for "by such enactment, becomes a contract between the State "and the corporators, and as such, has always been protect- "ed from impairment by legislative action by virtue of both "the Federal and the State Constitutions, each of which pro- "hibits the passage of any law by which the obligation of "existing contracts is impaired or lessened. City of Burling- "ton vs. Burlington Street Railway Co., 49 Iowa, 144; 31 "Am. Rep. 145. 'A grant in its own nature,' observed Chief "Justice Marshall in Fletcher vs. Peck, 6 Cranch, 87, 137, " 'amounts to an extinguishment of the right of the grantor " 'and implies a contract not to reassert that right'—a prin- "ciple which has been held in this State to be applicable to "franchises lawfully granted by a municipal corporation. "Stein vs. Mayor, etc., of Mobile, 49 Ala. 362; 20 Am. Rep. "283.

Stein vs. Mayor, etc., of Mobile, 49 Ala. 362; 20 Am. Rep. 283, in which the Court says: "The authority of the city "does not extend beyond these limits. It is a grant to Stein "by the city for this purpose; that is, a grant to him to "carry on the business of his water works in the city, under "his contract. 'A contract executed as well as one which is " 'executory, contains obligations binding upon the parties. " 'A grant, in its own nature, amounts to an extinguishment " 'of the right of the grantor and implies a contract not to " 'reassert that right. A party is, therefore, always estopped " 'by his own grant.' Marshall, C. J., in Fletcher vs. Peck, "6 C. R. 87, 137. The city of Mobile by its ordinance or "by-laws proposes to restrict the privilege thus granted to do "business in its limits under the contract above referred to, "unless Stein shall purchase a license by a fine or tax, which "is arbitrarily imposed by the city government. Can this "be done? This is the sole question in this case. Evidently, "the power of a city as a corporation, over its contracts, is no "more than that of a citizen in a like case. A corporation can- "not revoke a grant once made, and it cannot obstruct the full

"enjoyment of the privileges secured by it. *The power to "supply the inhabitants of the city with water necessarily im- "plies the right to carry on this business in the city;* it this "right should be interfered with at all, as there is no limit to "the interference, it may be defeated altogether. The con- "tract shows that this was not the purpose of the party. The "city government is the creation of the State Legislature. Its "powers, then, are restrained by all the constitutional laws of "the General Assembly of the State. It cannot pass by-laws "or ordinances which impair the obligation of contracts. Ang. "& Ames on Corp., secs. 18, 332, 333, 334, 335; Cooley's "Constitutional Limitations, 192, 193, 198. It cannot, then, "revoke its grant. This would be to impair a contract. "6 Cranch, 137, supra. The ordinance which assails the "privilege already granted impairs the contract on which it "depends, and is void; and the tax levied under its authority "by way of license cannot be supported."

Memphis & Little R. R. Co. vs. James H. Berry, etc., as Board of Commissioners; 112 U. S. 609—L. Ed., Book 28, p. 841. We quote: "The franchise of being a corporation "need not be implied as necessary to secure to the mortgage "bondholders, o rthe purchasers, at a foreclosure sale, the sub- "stantial rights intended to be secured. They acquire the "ownership of the railroad and the property incidental to it, "and the franchise of maintaining and operating it as such: "and the corporate existence is not essential to its use and "enjoyment. All franchises necessary or important to the "beneficial use of the railroad could as well be exercised by a "natural person. The essential properties of corporate exist- "ence are quite distinct from the franchises of the corpora- "tion. The franchise of being a corporation beongs to the cor- "porators; while the powers and privileges vested in and to be "exercised by the corporate body as such, are the franchises of "the corporation. The latter has no power to dispose of the fran- "chise of its members, which may survive in the mere fact "of corporate existence, after the corporation has parted with "all its property and all its franchises. If, in the present in- "stance, we suppose that a mortgage and sale of the charter "of the railroad company created a new corporation, what "becomes of the old one? If it abides for the purpose of re- "sponding to obligations not satisfied by the sale, or of own-

"ing property not covered by the mortgage or embraced in "the sale, as it may well do, and as it must if such debts or "property exist. Then there will be two corporations co-"existing under the same charter."

We conclude: That the city had the power to pass the ordinance of October 3rd, 1889, in favor of the Eastmans; that the ordinance was accepted by the Eastmans and then became irrevocable without consent of the holder of the grant.

That by it the said Eastman's and "their successors in in-"terest in the water works, were empowered to lay, maintain and repair water pipes in the streets of the city, and under the surface thereof, and to supply the inhabitants of the city with "mountain water," on demand, to the extent of their means, and at reasonable rates and without discrimination, and that both parties were bound by such contract and grant when accepted.

That in the Eastmans and their successors the same became a property right entering into and inseparable from the water works property and was a factor of the value of the same.

That such water right, or easement, or grant, was property, and of the water works property.

That it was transferable to the successors of said Eastmans, as property and as pertaining to the said water works.

That said Eastmans did sell and transfer the same with all their water works properties to the Boise Water Works Company, a corporation. That said Boise Water Works Company sold and transferred the same to the Artesian Hot & Cold Water Company, Limited, an Idaho corporation, and that said Idaho corporation sold and transferred the same, with the water works properties, to this plaintiff, a corporation of West Virginia; and that each of these parties had the

power both to purchase and own and to sell and transfer the same.

We claim that this property or franchise, or privilege, or grant, or power, or easement, or secondary franchise, whatever it is called, whether any one, or all of above named things, was the same thing in the hands of each of the successors of said Eastmans, as it was in the hands of the said Eastmans, with like powers and privileges, and the same and no other obligations or burdens.

The position of the defendant is, and since March, 1900, has been, that by reason of the nature of the artificial persons, which have successively been successors of the Eastmans, they were each, while owners of this property, under the *additonal obligation* to furnish free water under provisions of said section 2711, and that while the Eastmans were not, and said Sonna is not bound to furnish free water, because *natural* persons, that the said prior corporation successors of the Eastmans were and plaintiff is so obligated because each of the former were and plaintiff is a corporation, such as is described by said section 2711.

On the other hand, plaintiff contends, and its said predecessor corporation contended, that they each respectively had a right to purchase and own this property, including the said Eastmans' grant, which is also property, and that, in taking the same, by purchase and transfer as such successor, they each paid what it was worth, as it was in hands of their predecessor respectively, and took it the same as it was at first, and with no additional burdens. That to place upon said property and franchise and grant the burden of furnishing free water under said section 2711 would be to destroy the value of what they purchased.

Some of the cases already cited are authority for this position.

The case of the Santa Ana Water Company vs. Town of San Buenaventura, 56 Fed. 399, does in our opinion dispose if this last question.

In that case the town of San Buenaventura had granted to three individuals the privilege of furnishing the town with water for fifty years. At time of granting this, under a statute of California exactly like that of Idaho, on which defendant relies, a grant to a corporation formed to supply water to a town, required the furnishing of free water "for fire and "other great necessities," and also, like the Idaho statute, required the rates to be fixed by a commission chosen one-half by the town and one-half by the water company; in fact, Idaho sections 2710, 2711 and 2712 are taken from the California statute in force when the town of San Buenaventura made this contract with Arnaz and his associates. The town made a grant and contract with these natural persons such as it could not have done at that time with a corporation. Arnaz and his associates transferred the same and their water works to a corporation formed to supply the town with water. The town ratified this transfer, but this we consider immaterial, for at time of such ratification the town could not have made such a grant and contract with a corporation as had been made with Arnaz and his associates. The only effect such a ratification could have was to consent to the transfer. It did not affect the *nature* of the grantee corporation or the nature of the contract and grant to Arnaz and associates.

And the question was then, and now, "Could a corporation "formed to supply a town with water purchase such a grant "and operate it just as could the natural persons to whom it

"was first granted?" Or did the obligations of said sections of the statute so pertain to the *nature* of the corporation that it could not furnish the water under a grant and contract originally made to and with individuals except by assuming the obligations that would have been assumed by a corporation had the grant at first been made to a corporation?

In the opinion of the Court on p. 345 the learned Judge says: "It is clear that if the contract entered into between "the town and Arnaz and his associates * * * was a "valid contract and passed by assignment to the complainant "corporation, the obligation of that contract was protected "by the Constitution of the United States against impairment "by any act of the State, constitutional or statutory."

Here was a corporation organized under an act of Legislature of California approved April 22nd, 1858, from which the sections of the Idaho act are taken. As to fixing of rates, "was nature of the grantee corporation to govern, or were the "provisions of the contract as it was in the hands of individual "grantors to govern?" The Court, on page 348, says: "Ar- "naz and his associates were individual citizens. They were "not in any way bound to enter into the contract with the "Board of Trustees of the town. By the exercise of none of "its prerogatives as a governing body could the municipality "compel them to do so. The contract required their assent "as well as that of the Board of Trustees. Of course, in en- "tering into it they did so under existing laws: but no then "existing law has been pointed out, reserving to the State or "to the municipality the power to fix the rates the town, "through its Board of Trustees, contracted should be fixed "by Arnez and his associates. A statute of the State, ap- "proved May 3rd, 1852, providing for the incorporation of "water companies, declared in its third section, provided in "substance that a water company must allow the city to regu- "late the rates and that no exclusive right could be granted for "to exceed twenty years."

And the Court, continuing, on page 349 says: "That pro-

"vision had no application to Arnaz and his associates, for "the reason that they were not incorporated under that or any "other act."

After citing many authorities and giving many good and sufficient reasons, the learned Judge, on page 351, says: "I "am of opinion therefore that the contract in question in the "present case, in so far as it reserved to the parties of the "first part the unrestricted right to establish such rates for the "supply of water to private persons as they may deem expe- "dient, provided that such rates be general and subject, also, "to the implied condition that the rates be reasonable, was "a valid contract in the hands of Arnaz and his associates. "Did their rights in that respect vest by the assignment in the "complainant corporation?"

The Court holds that the "corporation was competent to "take by assignment whatever rights the contract of January "4, 1869, conferred upon Arnaz and his associates and that "were assignable by them."

In our opinion, an examination of this case, a comparison of the Constitution and laws of Idaho with those of California, at that time, and an examination of the authorities cited by the Court in the opinion in the case, establish the right of plaintiff, and of each of its predecessor corporations, to purchase and operate under the grant to the Eastmans, without incurring the obligation to furnish free water, any more than were the Eastmans obligated to do; and it will not be contended that the Eastmans ever were, or ever would be, so obligated if they had never sold their water works and had continued to operate them under this grant to present time.

The case of Los Angeles vs. Los Angeles Water Company, 177 U. S. 558; L. Co-op. Ed., Book 44, page 886, is in point as to rights to transfer Eastman grant and as to rights and privileges being the same in hands of a corporation grantee the same as in the hands of the individuals who were grantors.

Certain exclusive privileges had been granted to three individuals, Griffin, Beaudry and Lazard, and the question was as to whether the water company had the power or right to purchase, hold and enjoy these exclusive privileges. The Court held that the corporation could hold and enjoy the special privileges granted to the individuals and by them assigned to the corporation. The grant and contract was made to Griffin and associates in July, 1868. In August, 1868, they and others formed the water company corporation and afterwards the grant, contract and privileges and rights were assigned by the individuals to the corporation. There was no question but what the grant and franchise was one that, at the time it was made, and at time assigned, could not have been made with a water company corporation, both on account of the Constitution of the State, and on account of the fact that at that time California had the same statute as the one now relied on by defendant, which statute provides how rates are to be fixed which a water company corporation may charge.

In that case the point was squarely made that "the water "company had no power under its charter to collect water "rates, except as prescribed by the Constitution and statutes "of the State." The Court held otherwise.

The provisions of the Constitution and of the statutes of California relied on in that case are same as on same subject are in Constitution and statutes of Idaho.

The question there was and here is whether the nature of the corporation controls or the nature and powers of the contract and grant, or whether such property may be sold and assigned, and the assignee take it the same as it was in the hands of the assignor and grantor.

Los Angeles Water Company vs. City of Los Angeles, 88 Fed. 720.

This is same as above case in the Circuit Court and here the city contended that (p. 737) "The limitation in said con-"tract as to water rates is void because of the act of May 3rd, "1852 (St. Cal. 1852, p. 171). Said act, however, is not "applicable to case at bar, for the reason that Griffin, Beau-"dery and Lazard at date of said contract were not incorpor-"ated under that or any other act. The following extract "from the case of Santa Ana Water Co. vs. Town of San "Buenaventura, 56 Fed. 348, 349, is directly in point"; and after quoting from this case the Court says that the act "does "not purport to abridge the powers of municipal corpora-"tions, except in their dealings with private corporations cre-"ated under said act. The powers of municipal corporations "in their dealings with individuals are unaffected by said act "of 1852." The opinion in this case in 88 Fed. contains many citations and quotations directly in point, and which, in our opinion, do, as well as does the opinion itself, establish the fact that the water company corporations had each the power and right to purchase, and operate under, the Eastman grant and franchise, and that such property was in the hands of these, their successors, the same as in the hands of the Eastmans, and that the nature of the grantee did not change nature of the thing granted.

That the Eastmans had the power to sell and transfer this grant and franchise cannot be questioned, for by its terms it is made to "their successors in interest in their water "works."

That it became and was a property right, we think, must be admitted. That each of the successors of the Eastmans respectively had the power to purchase the water works and this property, or property right, is shown by the nature of the said corporate successors, and that the property, right, franchise, grant, easement and property right did not change its nature by such purchase and sale seems to us well estab-

lished by the authorities and to be in accordance with reason and right.

Planters Bank vs. Sharp et al., 6 Howard, 30, on page 326 the Court says: "Hence the general powers which still exist "under other governments, or might once have prevailed here "in the States, to change the tenor and rights over property "and especially the *jus desponendi* of it cannot now, under "the Federal Constitution, be exercised by our States to an "extent affecting the obligation of contracts."

DePeysler vs. Michael(6 N. Y. (2 Selden) ,467), 57 Am. Dec. 470. On page 475 the Court quotes from Grotius these words:

"Since the establishment of property, men who are masters "of their own goods have by the law of nature the power of "disposing of or of transferring all or any part of their "effects to other persons; *for this is the very nature of prop-"erty.*"..And from Aristotle: *"It is the definition of prop-"erty to have in one's self the power of alienation."* And the Court adds: The rule rests also on grounds of great public "utility and convenience, in facilitating the exchange of prop-"erty, in simplifying its ownership, and in freeing it from "embarrassments, which are injurious, not only to its pos-"sessor, but to the public at large."

San Luis Water Company vs. Estrader, 48 Pac. 1075. Here, too, a franchise was granted to certain individuals to furnish water to a town when the law of California was similar to that of Idaho. The individuals transferred the right to a corporation. The precise point was made that the owner of such a franchise could not transfer it to a corporation, not because of want of power in the owner, but because a corporation was a person of such nature that it could not thus obtain such a power or grant. After discussing the nature and powers of a corporation and the nature of the franchise and the authorities cited, the Court on page 1078 concludes:

"The grant to Benrimo and his associates was also to their "assigns. There can be no doubt but that they might, by "the terms of the grant, sell or assign the franchise. It seems "to me too plain to require argument that the purchase by the "plaintiff was strictly and directly within its powers and "contributed necessarily and directly to its objects and pur-"poses."

People vs. Stanford, 77 Cal. 360.

This case holds that a corporation may acquire franchises granted to individuals and the franchise in question was that of operating a street car system in a city, collect tolls, etc.

State vs. Western I. C. Company, 10 Am. St. Rep. 166.
Spring Valley Water Works Co. vs. Schottler, 110 U. S. 347; L. Ed., Book 28, p. 173.

In this case Justice Field has a dissenting opinion and we call attention to a portion of his argument and his citations and quotations, which none of the Justices would dissent from, found on page 182, book 28, Co-op. edition. Here the learned Judge by quotations from decisions of that Court draws the line of distinction between "*corporate rights*, privi-"leges and immunities derived directly from the State and so "kept under State control" and those "rights and interest ac-"quired by the company, not constituting a part of the con-"tract of incorporation," and which "stand on a different foot-"ing." That in respect to these latter "the State has no con-'trol." After stating what the State might do under the power it reserves in chartering corporations, the learned Judge adds: "But whatever property the corporation acquires in "the exercise of the capacities conferred, it holds under the "same guaranties which protect the property of individuals "from spoliation. It cannot be taken for public use without "compensation; it cannot be taken without due process of "law; nor can it be *subjected to burdens* different from those

"laid upon the *property of individuals under like circum-*
"*stances.*"

The learned Judge then quotes from an opinion of Judge Cooley in Detroit vs. Plank Road Co., 43 Mich. 140, in which quotation are these words: "And it cannot be necessary at "this date to enter upon a discussion in denial of the right of "the government to take from either individuals or corpora-"tions any property which they may rightfully have acquired. " * * * It is immaterial in what way the property was "lawfully acquired, whether by labor in the ordinary voca-"tions of life, by gift or descent, *or by making profitable use* "*of a franchise granted by the State; it is enough that it has* "*become private property and it is then protected by the law of* "*the land.*"

Anoka Water Works, etc., vs. City of Anoka, 109 Fed. 580.

Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed. 271.

An interesting case in Circuit Court of Appeals, Eighth Circuit, one involving franchise to a water company, power to sell, nature of property, right and power of city, and one discussing almost all the questions involved in case at bar. In the opinion, on page 282, Judge Sanborn says: "In con-"tracting the water works to supply itself and its inhabitants "with water, the city is not exercising its governmental or "legislative powers, but its business or proprietary powers. "The purpose is not to govern the inhabitants, but to obtain " a private benefit for the city itself and its citizens."

County of Scotland vs. Thomas, 94 U. S. 682; L. Ed. Book 24, p. 219.

Here the power of counties to subscribe for stock in a domestic railroad corporation was held to be a right and privi-

lege belonging to a foreign corporation into which the domestic corporation had been merged. That this power of the municpal bodies was a right and privilege of the corporation "passed with its other rights and privileges into the new "conditions of existence which the company assumed under "the consolidation."

Leathers vs. Janaey, 6 L. R. A. 661.

Louisville trust Co. vs. City of Cincinnati, 76 Fed. 296. On page 299 the Court says: "The grant of a right to enter "upon and occupy a public street with the necessary tracks, "poles, wires, and equipments of an electric street railway is "a grant of a typical easement in property, and as such is a "contract right capable, in the absence of express restrictions, "of being sold, conveyed, assigned or mortgaged, and is, "therefore, a right entitled to all the protection afforded other "property or contract rights."

Anoka Water Works vs. City of Anoka, 109 Fed. 580.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1; L. Ed., Book 43, p. 341.

In this case many of the questions involved here are discussed and the contract right and property right is held inviolable.

City Railway Co. vs. Citizens Street Railway Co., 166 U. S. 557; L. Ed., Book 41, p. 1114.

On page 1116 the Court says: "The grant when made "binds the public and is directly or indirectly the act of the "State. The easement is a legislative grant, whether made "directly by the Legislature itself, or by any one of its prop- "erly constituted instrumentalities." And on page 1118 the Court says: "It is universally held that a previous request "for an ordinance obviates the necessity of a subsequent ac-

"ceptance." The ordinance of the Eastmans was ordained on their request.

Africa vs. Board of Mayor, etc., 70 Fed. 729.

As to the fact that a contract and ordinance made with and to individuals may be assigned to a water company corporation and that the company takes it the same as in hands of the individuals to whom grant was made, very much in point is the case of the Bellevue Water Co. vs. City of Bellevue, 35 Pac. 693. This is an Idaho case.

In March, 1897, the city of Bellevue passed an ordinance granting to Young and his associates a franchise to lay pipes in its streets to supply it and its inhabitants with water, and therein agreeing to pay for water for *fire purposes*. In February, 1887, the Legislature passed the act adopting the Revised Statutes of 1887, in which is said chapter V of title IV, containing said sections 2710, 2711 and 2712, section 2711 being the one providing that such corporations must furnish *free water* for fire purposes.

After the act was in force the Bellevue Water Company was formed and organized and to it was sold and transferred the contract and franchise granted by the city of Bellevue to Young and his associates. For some years the city paid for water for fire purposes, but in 1890 and the following three years the city took the ground that, as the water company was such a corporation as was described in sections 2710, 2711 and 2712, and was formed under that act, that by its nature and the law of its creation, it must furnish free water for fire purposes. The Court held that the water company had the same rights as had Young and his associates; that the contract, not the nature of the company, governed.

City of Boise vs. Artesian Hot & Cold Water Co., 39 Pac. 562.

In this case in the Supreme Court of Idaho, the city took the ground that the water company must furnish the city with water for fire purposes free of charge under this very sec. 2711, because it was a corporation organized under the laws of daho and was furnishing water to the inhabitants of the City.

In short, that, because of the nature and business of the corporation, this obligation was upon it. But,the Court held that, as it did not appear that the water company was acting under section 2710, the complaint stated no cause of action. In other words, the Court held that the fact that the water company was a corporation formed to supply water to the city and to the inhabitants thereof, did not of itself bring the water company within the provisions and obligations of sec. 2711. And that to do this it must also appear that the company by ordinance or by contract be brought under section 2710.

No doubt, under advice of counsel, and to get around this decision, the city passed ordinance 304, pretending to grant to the water company in April, 1900, a grant and franchise to lay pipes and furnish water; an ordinance passed after the company had been acting under the Eastman grant for about ten years and an ordinance rejected by the water company at once.

This Idaho case, it seems to us, disposes of the contention of defendant that because plaintiff and its immediate predecessor was a water company corporation, it must be under this obligation to furnish free water, whether or not it had

obtained, or any corporation predecessor had obtained such grant and franchise from the city as is mentioned in said sections 2710 and 2712. In short, that the nature of the contract and property right govern, not nature of the owner of the water works as to whether a natural or an artificial person.

City of New Orleans vs. Great South Telephone & Tel. Co., 21 Am. & Eng. Corp. Cases, 35.

Here the city attempted to create or add an additional burden upon a corporation using its streets, in additon to what was in the grant, which the predecessor of the corporation had accepted and acted upon. Court held city had no such power.

Right and power of water company, *jus desponendi.*

Had the water company corporations, which were successors of the Eastmans and predecessors of plaintiff, the same right and power to sell as had the Eastmans? Could they sell both the water works and all properties and property rights appertaining to the water works, including this easement, grant and secondary franchise obtained from the city?

The position of defendant is that neither of these Idaho corporations could sell or dispose of all these properties and property rights. Defendant says they were *quasi* public corporations and therefore could not disable themselves from performing their public duties by sale of all their property.

Section 163, 1 Vol. Clark & Mar. on Private Corp., p. 444. says: "A corporation cannot, without express authority from "the legislature, transfer or mortgage its franchise to be a cor- "poration, for this would result in the creation of a corpora- "tion without the consent of the Legislature. Nor * * *

"can a quasi public corporation transfer the franchises or spe-
"cial privileges other than the franchise to be a corporation
"conferred upon it by its charter, * * * unless such
"transfer is expressly authorized by the Legislature." And to this the author cites very many cases. Then, on page 446, the author says in speaking of this doctrine: "But in some "States it has been criticised and even disregarded." Cites very many authorities. It will be noticeable that the author described a different franchise from that received by the Eastmans in two essential respects; he speaks of franchises "*con-*
"*ferred upon it by its charter.*" Now, in Idaho the corporation is complete and fully organized without this franchise of use of streets or right to furnish water to inhabitants, and, as we have seen, our Supreme Court so held in effect. Second, the franchise we have operated under was never granted by the city to any corporation, but to individuals, who accepted it, expended money on faith of it, and then sold it to a corporation with their other water works properties as by the terms of the grant they might do. In our opinion, there is no such great diversity in the decisions of courts as the said author seems to imply. We have seen no case where it has been held that such a franchise as was granted to the Eastmans it not property and as such is not transferable. It is the distinction between a corporate franchise and a franchise of a corporation which the author does not here seem to make. No doubt defendant relies on a class of cases like that of Oregon R. R. & Nav. Co. vs. The Oregonian R. R. Co., 130 U. S. 1.; Law. Ed. Book 32, 837. Here the Court were considering a *corporate franchise* and *corporate* property and *those without which* the road could not perform the functions for which it was created. It could not operate a road or act

as a railroad company if it had not the particular road and the only road it was created to operate, and yet it claimed to continue to exist for another purpose—that of being lessor of railroads, when no such lessor corporation was known to the laws of Oregon. And the Court calls attention to the fact that the transfer of all this property was not attempted to be made in view of a dissolution which it might effect voluntarily, but was made in view of continuing its existence in another capacity from that for which it was created.

Now, in the case at bar, as we have attempted to show, the sale was of property and franchise not necessary to the existence or the operation of the company. The corporation was no more formed to own and operate the Eastman water works and franchise than it was to own and operate the Sonna water works and franchise or any other property and franchises. And, moreover, under a statute permitting voluntary dissolution with the approval of the State through its judicial department, in the case at bar, the sale was made in view of dissolution which was immediately proceeded upon effected and approved by decree of court, long prior to the bringing of this action. The Idaho Company with consent of the State ceased to exist soon after the sale of all of its property and the plaintiff is its successor with, under the Idaho Constitution and laws, all the rights, privileges and powers of an Idaho corporation, and is, no doubt, under like duties and obligations. We are not claiming any immunities on account of being a foreign corporation.

We claim that so far as property was concerned the corporation which succeeded to the ownership of the water works and franchise (if it can be called a franchise) of the Eastmans had the same absolute *jus disponendi*, as had the Eastmans.

None of these (our predecessors) corporations received anything from the State except existence and power to act as a corporation. The properties disposed of including the incorporeal and intangible property and privilege granted to the Eastmans by the city were not indispensably necessary to their existence as such a corporation, or to their operating and acting as a water company formed to supply water to the city and its inhabitants.

The status of a railway corporations and of some other *quasi public* corporations which have received from the State itself important powers and were incorporated to operate a particular line of road is far different from the status of any of the successors of the Eastmans and essentially different in the very respect mentioned in the decisions as the grounds for holding in many cases that such corporations could not alienate all their properties and abandon duties they owed to the State.

State vs. Western Irrigating Canal Co., 40 Kans. 96; 10 Am. State Rep. 166.

Willamette Woolen Mfg. Co. vs. Bank of British Columbia, 119 U. S. 191; Law. Ed. Book 30, 384.

We quote, "But there were franchises created by the act "of incorporation which would be of no value to the pur- "chaser, which in the nature of things, could not be trans- "ferred to it. Obviously among these was the right to exist "as a corporation. The sale under the decree of foreclosure "did not annihilate the Willamette Woolen Mfg. Co. so that "it no longer had any existence. Nor was its power to make "contracts, to sue and be sued, to have a common seal, to "buy other lands and sell them, to make by-laws and do many "other things which an incorporated body can do * * *

"nor is it at all clear that, if it had sold outright the prop-
"erty which it mortgaged to this company it would not still
"have the right to take other water from the Lasstian River
"and conduct it to other mills and other places for the purpose
"of manufacturing, provided it did not interfere with or
"limit the water and use of the water it had sold."

The above corporation was created by a special law and given special rights and privileges, and while not a *quasi public* corporation as to its business, yet it was created for public corporation as to its business, yet it was created for a special purpose and given special privileges and great powers including right of eminent domain, and the right to the waters of a certain river. As to its nature it was from the State with powers of the State and waters of the State.

The case at bar is one where the business is of a public nature, but the nature of the corporation of none of the successors of the Eastmans has been *quasi public.*

None of them received anything from the State except birth and life. Our statute makes them "private corporations;" after organization under one chapter of our laws, such corporation could, perhaps, under another chapter have developed into a *quasi public* corporation by securing from the city a franchise of use of its streets for furnishing water to its inhabitants and thus indirectly obtaining such franchise from the State, and so by operation of the two chapters, and its own, and, the city's governmental, acts, become a *quasi public* corporation owing duties to the State. And this would be by regarding the granting such franchise of its streets for such purposes as acting in a governmental capacity and as a part of the State government, rather than as acting in its proprietary capacity. But even this is against the weight of authority. As a matter of fact, these corporations received

nothing from the State but existence, which they have surrendered back to the State with its permission, they are dissolved by decree of the Court. They never owed duties to the State as corporations—no duties regarding their said properties more than or different from those owed by the Eastmans while owning the same properties, and this in like manner, and no different from those owed by Mr. Sonna, who is now using like properties in like manner under like grant from the city. This is in harmony with the decision of the Idaho Supreme Court, in 39 Pac. 566, when it held that there is neither duty nor right to furnish water for fire purposes unless under contract or ordinance of the city.

The case of the Central Transportation Co. vs. Pullman Palace Car Company, 139 U. S. 24; Law. Ed. Book 35, p. 55, is a leading case of the class of cases on which defendant must rely. This case reviews the former cases decided by the Supreme Court and by apt quotations calls attention to the essential and distinguishing characteristics of the cases where it is held that all the properties and franchises could not be alienated. It was a case where suit was brought on a contract leasing the propeties and franchises of the corporaiton for ninety-nine years to another corporation and in the contract the lessor agreed not to do the business for which it was chartered, during that time, and to do no business except to receive and distribute the rents.

And the Court says: "The plaintiff, therefore, was not an "ordinary manufacturing corporation such as might, like a "partnership or individual engaged in manufacture, sell or "lease all its property to another corporation. Ardesco Oil "Co. vs. North American Oil & Min. Co., 66 Pa. 375. Tread-"well vs. Salisbury Mfg. Co., 7 Gray 393. But the purpose "of this incorporation, as defined in its charter, and recog-

"nized and confirmed by the Legislature, being the transpor-
"tation of passengers, the plaintiff exercised a public employ-
"ment, and was charged with the duty of accommodating the
"public in the line of that employment, exactly correspond-
"ing to the duty which a railroad corporation or a steamboat
"company, as a carrier of passengers, owes to the public in-
"dependently of possessing any right of eminent domain. The
"public nature of that duty was not affected by the fact
"that it was to be performed by means of cars constructed
"and of patent rights owned by the corporation, and over
"roads owned by others. The plaintiff was not a strictly
"private, but a *quasi public* corporation; and it must be so
"treated, as regards the validity of any attempt on its part
"to absolve itself from a performance of those duties to the
"public, the performance of which by the corporation itself
"was the remuneration that it was required by law to make to
"the public in the terms of the grant of its franchise.
" * * * The evident purpose of the Legislature, in
"passing the statute of 1870, was to enable the plaintiff the
"better to perform its duties to the public, by prolonging its
"existence, doubling its capital, and confirming, if not en-
"larging, its powers. An intention that it should immedi-
"ately abdicate those powers and cease to perform those du-
"ties, is so inconsistent with that purpose that it cannot be
"implied without much clearer expressions of the legislative
"will, looking towards that end, than are to be found in the
"statute. But the road and franchises are generally inalien-
"able, and they are so, not only because they are acquired by
"legislative grant, or any exercise of special authority, given
"for the specific purposes of the incorporating act, but be-
"cause they are essential to the fulfillment of those purposes:
"and it would be a dereliction of the duties owed by the cor-
"poration to the State and to the public to part with them."

And the Court, quoting from other decisions, says: "The
"rights, duties and obligations of the defendant are defined
"in the acts of the Legislature of Indiana under which they
"were organized, and reference must be had to these, to ascer-
"tain the validity of their contract. They empower defend-
"ants respectively to do all that was necessary to construct
"and put in operation a railroad between the cities which are
"named in the act of incorporation. There was no authority

"of law to consolidate these corporations, and to place both "under the same management, or to subject the capital of "the one to answer for the liabilities of the other; and so the "Courts of Indiana have determined. * * * The powers "are conceded in consideration of the advantage the public "is to receive from their discreet and intelligent employment, "and the public have an interest that neither the managers nor "stockholders of the corporations shall transcend their au- "thoity." "Important franchises were conferred upon the "corporation to enable it to provide the facilities to communi- "cation and intercourse required for the public convenience. "Corporate management and control over these were pre- "scribed, and corporate responsibility for their insufficiency "provided, as a remuneration to the community for their "grant. The corporation cannot absolve itself from the per- "formance of its obligation without the consent of the Legis- "lature."

The contrast to above and that which distinguished the case at bar is described by the Court in the case of Miner's Ditch Company vs. Zellerbach (99 Am. Dec. 307). In the words "of this class are railroad, turnpike and canal com- "panies and corporations strictly private, the direct object of "which is to promote private interests and in which the public "has no concern, except the indirect benefits resulting from "the promotion of trade and the development of the general "resources of the country. They derive nothing from the "government except the right to be a corporation, and to "exercise the powers granted. In all other respects, to the "extent of their powers, they stand upon the footing of natural "persons, having such property as they may legally acquire, "and holding and using it ultimately for the exclusive benefit "of the stockholders."

"Ownership of property, whether real or personal, carries "with it the same general power of disposition, in corporations "as in individuals, except where the power is restrained by "statute or by considerations of public policy." Angel & Ames on Corp., sec. 187.

Leathers vs. Janney, 6 L. R. A. 661.

In White Water Valley Canal Company vs. Vallette, 62 U. S. 414; Law. Ed. Book 16, p. 158, Justice Campbell says: "It is well settled that a corporation, without special authority, may dispose of lands, goods and chattels or of any interest "in the same, as it deems expedient, and in the course of their "legitimate business may make a bond, mortgage, note or "draft; and also make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law."

The doctrine that a *quasi public* corporation cannot transfer its properties and franchises is fully expressed by Mr. Justice Miller in Thomas vs. Railroad Company, 101 U. S. 71; 25 Law. Ed. 950, in these words: "Where a corporation "like a railroad company has granted to it by charter a franchise intended in a large measure to be exercised for the "public good, the due performance of those functions being "the consideration of the public grant, any contract which "disables a corporation from performing those functions— "which undertake without the consent of the State to transfer to others the rights and powers conferred by the charter "and to relieve the grantees of the burden which it imposes— "is a violation of the contract with the State and is void as "against public policy. This dostrine is asserted with remarkable clearness in the opinion of this Court delivered by "Mr. Justice Campbell in Railroad Company vs. Winans, 17 "How. 330, * * * 'this conclusion (argument) implies " 'that the duties imposed upon plaintiff by the charter are ful- " 'filled by the construction of the road, and that by alienating " 'its right to use, and its powers of control and supervision, " 'it may avoid further responsibility. But those acts involve " 'an overturn of the relations which the charter has arranged " 'between the corporation and the community. Important " 'franchises were conferred upon the corporation, to enable " 'it to provide facilities for communication and intercourse " 'required for public convenience. Corporate management " 'and control over these were prescribed and corporate re- " 'sponsibilities for their insufficiency provided as a remunera- " 'tion to the community for their grant. The corporation " 'cannot absolve itself from the performance of its obliga- " 'tions without the consent of the Legislature.' "

The rule depends upon the reasons for the rule. In the case at bar none of these reasons exists. Here the corporations to whom the Eastmans sold their water works and rights and privileges and all pertaining thereto received nothing from the State that they have not returned back to the State, and the same has been accepted by the State. They got nothing by their charter but the right to exist and do business as such corporation. The franchise of laying and maintaining pipes in the streets, if franchise it can be called, the State did not grant and could not grant, but the State empowered the city to grant such franchises and the city did so in its proprietary capacity as agent for its inhabitants and granted it with the right of assignment to their successors.

There is a sense in which the corporate franchises are not the property of the corporation. The franchise of existence and power to do business is the property of the stockholders, not of the corporation. A corporate franchise enters into and is a part of the franchise of incorporation. It comes from the State and is not the property of the corporation, but its life-blood.

Other franchises are in the nature of property, are not received from the State and, as was said in Leathers vs. Janney, 6 L. R. A. 661, "No law prevents a corporation from "selling any or all of its property, provided the charter con- "tains no prohibition thereof, and it acts in accordance with "the duly expressed will of its stockholders and directors." And in the same case, "The same person may fill the office "of treasurer of two distinct corporations, and such identity "does not of itself invalidate dealings between the two cor- "porations."

The Common Law powers of a corporation are the same as those possessed by individuals and may be employed in

the same manner unless restricted by some positive or clearly implied prohibition of law. DeGroff vs. American Linen Thread Co. 21 N. Y. 124. Williams vs. Wala Walla Tel. Co. 9 Abb. N. C. 443. Barry vs. Merchants' Exchange Co., 1 Sandf. Ch. 280. White Water G. C. Co. vs. Vallette, 62 U. S. 414. (Here see cases cited in note 6 L. R. A. p. 661.) In Klosterman vs. Mason County Central R. R. Co., 36 Pac. 136, the Supreme Court of Washington had occasion to pass on a transfer of the property and franchise of a corporation. The powers of corporations to dispose of "property both real "and personal" are the same as in Idaho and the Washington Constitution has the same section as the Idaho Constitution providing that in case of lease or sale the property or franchises are not relieved from any burden. The Court says, 138, "In this case there is no showing that the appellant cor- "poration ever acquired any of its property except by pur- "chase; and, under these circumstances, it was under no obli- "gations to the public to retain its property, or to continue "its business, longer than it deemed expedient to do so. In "other words, no one but its creditors had the right to ques- "tion the disposition of its property. The statute, as we have "seen, conferred upon it the power to dispose of its property, "both 'real and personal,' and the Constitution would seem "to imply a right even to dispose of its franchise, but not in "such a manner as to relieve the franchise, or property held "under it, from certain liabilities of the grantor. Const. "Art. 12, Sec. 8.

"The learned counsel for the respondent and the inter- "venor insist that, by virtue of the above cited provision of "the Constitution, the property in question is still subject to "the claim of the respondent. But we are not of that opinion. "That provision declares, in effect, that, if a corporation shall "release or alienate its franchise, neither the franchise, nor "property held thereunder, shall thereby be relieved from lia- "bility contracted or incurred in the operation, use or enjoy- "ment of such franchise, or any of its privileges. This is

"but a declaration of what the Courts have generally held to "be the law, irrespective of the constitutional limitations or "provisions."

Bigelow J. in Treadwell vs. Salisbury Mfg. Co., 7 Gray 393, says: "Nor can we see anything in the proposed sale to "a new corporation, and the receipt of their stock in payment, "which makes the transaction illegal. It is not a sale by a "trustee to himself for his own benefit, but it is a sale to an- "other corporation for the benefit and with the consent of "the *cestuis que* trust, the old stockholders. The new stock "is taken in lieu of money to be distributed among those stock- "holders who are willing to receive it, or to be converted into "money by those who do not desire to retain it. Being done "fairly and collusively, as a mode of payment for the prop- "erty of the corporation, that transaction is not open to a "valid objection by a minority of the stockholders. Hodges "vs. New England Screw Company, 1 R. I. 347 (53 Am. "Dec. 624)."

"The Banks vs. Portiaux, 3 Randolph, 136; 15 Am. Dec. "706. '*Jus disponendi* in corporations: Ownership of " 'property, whether real or personal, carries with it the same " 'general powers of disposition as in individuals except where " 'that power is restrained by statute or by considerations of " 'public policy.' Angel and Ames on Corp. sec. 187. It "may, therefore, in the absence of such restraint, sell what- "ever it has a right to own."

Arthur vs. Commercial Railroad Bank of Vicksburg, 9 Smedes & Marshal, 394.

Treadwell et al. vs. Salsburg Manf'ct. Co. 7 Gray, 393.

McClutcheon vs. Mez Capsule Co., 71 Fed. 787.

In this case the Court holds that if a corporation purposes to wind up its affairs and go out of business, it may sell all its property, but that it may not sell its property and agree not thereafter to do the business it was created to do unless it is

to be dissolved. It may not be a corporation within a corporation.

Homes & Griggs Manf. Co. vs. Homes & Wesset Metal Co., 127 N. G. 252, 27 N. G. 831.

Merz Capsule Co. vs. U. S. Capsule Co. 69 Fed. 414.

Baltimore Trust Co. vs. May & City, 64 Fed. 153.

City of Cleveland R. R. Co. vs. City of Cleveland, 94 Fed. 385.

Illinois Trust & Savings Bank Co. vs. City of Arkansas, 76 Fed. 271.

Capital City Light Co. vs. City of Des Moines, 72 Fed. 829.

Workman vs. Southern P. R. Co., 62 Pac. 185.

City of Los Angeles vs. Los Angeles Water Co., 57 Pac. 210.

Eddy on Combinations, Vol 2, secs. 1105, 1106, 1107 and 1110.

Dell on Mun. Corp. (4th Ed.), secs. 68a, 691 and 697, and cases cited under sec. 68a on p. 115.

The grant to the Eastmans, and to "their successors in in-"terest in their water works," gave to the Eastmans power to have and choose their successors. Powell vs. McGuire, 43 Cal. page 21, the Court says: "When the Legislature "grants a franchise to a particular person, his associates and "assigns, it delegates to him the right to select the person "thereafter to be associated with him in the enterprise."

The Eastmans obtained from the city a franchise of no value unless it carried with it the right to use the water pipes when laid.

Sullivan vs. Lear, 11 Am. State Rep., 388. On page 390 the Court says: "The franchise of the bare right to do a "thing considered with reference to itself is of no value. It "is only when it is considered relatively and in connection "with its use that it can be said to be valuable."

National Water Works vs. Kansas City, 65 Fed. 601.

Southwest Mo. Light Co. vs. City of Joplin, 113 Fed. 871.

Foster vs. Frankling L. & V. Turnpike Road Co., 65 S. W. Rep. 840, 15 Am. & Eng. Corp. Cases (new series), 858.

This case shows the Eastmans had the absolute right to sell to *any* person who would buy and that an act of the Legislature requiring them to sell to certain persons would have been void as against their contract and property rights.

Lake View Land Co. vs. San Antonio Traction Co., 66 S. W. Rep. 766, Am. & Eng. Corp. Cases (new series), 1.

People *ex rel* City of Pontiac vs. Central Union Tel. Co., 61 N. E. Rep., 15 Am. & Eng. Corp. Cases (new series), 416.

We admit that *quasi public* corporations, which have received from the State not only their corporate existence but important powers and special privileges and have duties and trusts

imposed upon them by the State, corporate in nature, cannot alienate their property and franchises necessary to perform such duties; as stated by Clark & Marshall on Corporations, section 162a: "They cannot sell or lease their corporate "powers and privileges and thereby disable themselves from "performing their public duties without legislative authority."

Our predecessor corporations got from the State existence only, and no powers or privileges, corporate or otherwise, except it be the power to do business, and all they received from the State they held, until, by consent of the State, they surrendered them back to the State and ceased to exist. They sold nothing received from the State. The franchise that entered into and became a necessary and inseparable part of their properties came to them with the property, and went from them with their properties, necessarily, and was, by its express terms, to go to "their successors in interest", in the property.

All that the Legislature of the State could take from our predecessor corporations has been surrendered to the State and accepted by the State. It could alter, amend or repeal their charter, but it had no power over the vested rights of property—no power over anything transferred to us. Clark and Marshall on Corporations, section 276.

The case of the Detroit Citizens Street Railway Company vs. Detroit, reported in 64 Federal 628, 26 L. R. A. 667, decided by Circuit Court of Appeals, 6th Circuit, is one very closely in point in the case at bar, and discusses many questions involved in this cause. Here the city had granted an easement, or franchise (both terms are used) to the predecessor in interest in the properties of plaintiff for a term of years

greater than the term for which the corporation grantee could exist.

The Court summarizes the opinion of the Circuit Court under review (Detroit vs. Detroit City R. R. Co., 55 Fed. 569) as follows: "The Circuit Cout held as follows: '(1) "'That the power to make the grant relied on by defendants "'in this case must be found in the train or street railway "'acts, or not at all.

"'(2) That the power conferred by those acts to grant "'an easement in the streets to the street railway company is "'not an express, but an implied power.

"'(3) That "a power implied must be limited to the "'"necessity that gives rise to its implication."

"'(4) That "an inevitable limitation thus arising in that "'"the easement shall not endure beyond the life of the fran-"'"chise for which this easement was given."

"'(5) That the corporate life and corporate franchises "'originated under a general law which limited their continu-"'ance to a period of thirty years.

"'(6) It therefore followed that the power of the city "'was limited to the grant of an easement of way in the "'public streets not exceeding in duration the corporate life "'of the company receiving the grant.

"The very eminent counsel for the city have, in addition to "the points of the decision stated, argued very strenuously "that, irrespective of the capacity of the city to make the grant "in question, it was not within the corporate power of the "Detroit City Railway Company to receive a street franchise "for a term extending beyond its corporate franchise. *We "cannot at all agree to this proposition. The duration of any "estate which such a corporation may take must depend upon "the language of the grant and the power of the grantors to "make it.*

"It was an incident at Common Law to every corporation "to have a capacity to purchase and alien lands and chattels "unless they were especially restrained by their charter or "statute." 2 Kent, Com. 281, 282.

The same author says: "Corporations have a *fee simple* "*for the purpose of alienation,* but they have only a determin- "able fee for the purpose of enjoyment. On the dissolution "of the corporation, the reverter is to the original grantor "or his heirs; but the grantor will be excluded by the aliena- "tion in fee, and in that way the corporation may defeat the "possibility of a reverter."

"If real or personal or negotiable contracts are conveyed "to a corporation, subject to no condition, the company has "the right to convey the same absolutely, and in such case "the title of the purchasor will not be affected by the sucse- "quent dissolution of the corporation." Morawetz Private Corporations, secs. 330, 1031; Nicoll vs. New York & E. R. Co., 12 N. Y. 121; State vs. Rives, 27 N. C. 305-309; People vs. O'Brien, 111 N. Y. 13, 2 L. R. A. 255; Omaha Bridge Cases, 10 U. S. App. 192, 2 C. C. A. 174, 51 Fed. Rep. 309.

The case last cited was where a lease of trackage and bridge right was made to a railroad company for 999 years, which had only a corporate life for forty years.

In People vs. O'Brien, cited above, the instance was that of a grant of an easement, in the streets of New York, unlimited as to time. The grant of street rights had been made by the city of New York in perpetuity to a street railway company having a corporate life limited to one thousand years, but subject to reserve right of amendment, alteration, or repeal. The grant was made by authority conferred by an amendment to the Constitution of the State, adopted 1875, which prohibited the enactment of any law which should authorize "the "construction or operation of a street railway except upon "condition that the consent of the owners of one-half in value "of the property bounding on, and the consent also of the "local authorities having the control of that portion of the "street or highway upon which it is proposed to construct or "operate such road be first obtained." N. Y. Const., Art. 3,

section 18. The Court of Appeals of New York in a most elaborate opinion held:

(1) That the "*consents*" *obtained* "*were the muniments* "*of title to the enjoyment of the rights acquired thereunder by* "*the railroad company,*" and *constituted a property interest which was not destroyed by the repeal of the charter.*

(2) That there was no limitation upon either the power of the city to grant an easement in perpetuity, extending beyond the prescribed life of the corporation, nor did such limitation operate to limit the power of the corporation to receive such a grant. The Court said, as to the duration of such a grant, that "this is to be determined by a consideration "of the language of the grant and the extent of the interest "which the grantor had authority to convey. We think this "question has been decided by cases in this Court, which are "binding upon us as authority in favor of the perpetuity of "such estates. That a corporation, although created for a "imited period, may acquire title in fee to lands or properties "necessary for its use, as decided in Nicoll vs. N. Y. & E. R. "Co., 12 N. Y. 121, where it was held that a railroad corpor- "ation, although created for a limited period, might acquire "such title, and that, where no limitation or restriction upon "the rights conveyed was conveyed in the grant, the grantee "took all the estate possessed by the grantor. The title to "streets in New York is vested in the city for the people of "the State, but under the Constitution and statutes it had "authority to convey such title as was necessary for the pur- "poses of corporations desiring to acquire the same for use "as a street railroad. The city had authority to limit "estate granted, either as to the extent of its use or the time "of its enjoyment, and also had power to grant an interest "in the streets for public use in perpetuity which should be "irrevocable. Yates vs. Van De Bogert, 56 N. Y. 526; "*re* N. Y. Cable R. Co. 109 N. Y. 32. Grants similar in all "material respects to the one in question, have before been "before the Courts of this State for construction; and it has "been quite uniformly held that they vest the grantee with "an interest in the streets in perpetuity for the purpose of a

"street railroad. People vs. Sturtevant, 9 N. Y. 263, 59 Am. "Dec. 536; Davis vs. N. Y., 14 N. Y. 506, 67 Am. Dec. 186; "Milhau vs. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; N. Y. "vs. Second Avenue R. R. Co., 32 N. Y. 361; Sixth Ave- "nue R. R. Co. vs. Kerr, 72 N. Y. 330. Other cases are "also reported in the books, but it is deemed unnecessary to "accumulate authorities on this point."

"We are clearly of the opinion that the power of the De- "troit City Railway Company was not restricted to the taking "of such a grant for a term limited by its corporate life.

"The fact that it could not personally enjoy the interest "thus granted after the expiration of its substantial and cor- "porate franchises would not cut down the estate granted. "Its power of alienation was unaffected, and its assignee, "if otherwise endowed with the franchises essential to the "operation of a street railway, might enjoy the rights and "privileges derived by assignment. The duration, character "and extent of an estate conveyed to a corporation must be "determined by the terms of the grant, unless there be an ex- "press prohibition in its organic law, or one imposed by "statute. Angel & Ames Corporations, sec. 195; State vs. "Rives, 27 N. C. 305-309; Asheville Division No. 15, Sons "of Temperance vs. Ashton, 92 N. C. 579; State vs. Laclede "Gaslight Co., 102 Mo. 472 and 487; Gere. vs. N. Y. & Hud- "son Railway Co., 19 Abb. N. C. 193, 203, and cases cited above. There is nothing in the nature of a property right "involved in a grant of easement in the streets for street "railway uses which distinguishes it from other property "acquired by a corporation in the exercise of its franchises; "but it by no means follows that, because the street railway "company had the capacity to take an easement in the streets "for a term extending beyond its corporate franchises, the city "had the power to make such a grant."

And as to power of city to grant such easements, the Court says: "If the use of the streets for street railway purposes "is a legitimate use, then it must follow that the general "powers vested in the city by its charter 'to open, close and "'widen streets,' and 'to prescribe, control and regulate the "'manner in which the highways, streets, avenues,' etc., "'shall be used and enjoyed,' is a power broad enough to

"permit the city to consent to the use of its streets for such "purposes by any company having the requisite franchises of "a street railway company. Judge Dillon, in his work on "Municipal Corporations (sec. 575), in summing up his con- "clusions with respect to the general charter powers of muni- "cipalities over their streets as affecting the power to grant "permission for such use of streets by street railways, says: " 'The ordinary powers of municipal corporations are usu- " 'ally ample enough in the absence of express legislation on " 'the subject to authorize them to permit or refuse the use " 'of streets within their limits for such purposes.'

"Upon a full consideration of the subject, the Supreme "Court of Kansas, in the case of Atchison vs. Missouri Pa- "cific R. R. Co., 31 Kan. 601 (the opinion being by Judge "Brewer, now Associate Justice of the Supreme Court), came "to the same conclusion. Bearing on the same question are "the cases of Brown vs. Duplessis, 14 La. Ann. 854; State "vs. Corrigan Consol. Street R. R. Co., 85 Mo. 274, 55 Am. "Rep. 361; Davis vs. Mayor, etc., N. Y., 14 N. Y. 506, 67 "Am. Dec. 186."

The Court then cites from the Constitution and laws of Michigan and comes to the conclusion that it is the policy of the State Constitution to place control of streets in the local municipalities, that the Legislaure could not grant such easements in streets, that it is a local matter. And the Court says: "However this may be, we are of the opinion that "these acts do directly confer power to consent to such use of "the streets, and that, when such consent is once given and "accepted, it is irrevocable for the term fixed by the grant. "The power to consent is in and of itself the power to grant "an easement. The 'consent' is an easement, and the act of "consenting to the use of the streets for street railway pur- "poses is the act of granting an easement in the streets. Con- "sent to such use of streets constitutes a typical easement, "and the right granted thereby is an interest in reality, being "an incorporeal hereditament. Whether this easement is "subject to revocation, or is in perpetuity, or for a term of "years, may depend upon the terms of the ordinance, or the

"further terms of the act conferring the power to grant "consent.

"What the Legislature meant by the 'consent' it intended "the municipality should grant if it saw fit is illustrated by "section 10 of the Train Railway Law. That section per- "mitted such companies to enter upon and condemn, under "the State's right of eminent domain, a right of way a hun- "dred feet in width, but limited this right by prohibiting the "location of such road 'through an orchard or garden with- " 'out the consent of the owner thereof.' This did not in any "true sense make the operation or exercise of the franchise "granted dependent upon the owner of the orchard or gar- "den. It simply said to such companies: 'We grant you " 'the power to enter upon and condemn a right of way; but " 'if, in the exercise of your franchise, you wish to locate " 'your road through an orchard or garden, this power shall " 'not be taken to authorize you to locate your road through " 'such orchard or garden without you obtain the owner's " 'consent—that is, unless you, by agreement, obtain an ease- " 'ment from the owner.'

"It is not enough that the incorporators have obtained a "franchise to be an incorporation, nor that the corporation "has been endowed with power to operate a railroad, com- "mercial or street; but it must also acquire, from those own- "ing of controlling the property on or over which it is pro- "posed to run their road, a permission to occupy sufficient "land for that purpose. In this sense it may be said that "every railroad company having the requisite franchise to "acquire, own and operate such road, and not having the "power of eminent domain, is unable to exercise its franchise "to operate such a road until it shall first obtain the 'consent' "of those owning or controlling the land over which its road "must be constructed. But it is not true that either the fran- "chise to construct or operate a railway comes from the own- "ers of private lands or the municipal authorities controlling "the public streets. The right to construct and operate a road "through an orchard or garden or on the public streets is "dependent, in the first instance, upon the consent of the "owner of the orchard or garden, and, in the second, on the "consent of the local government controlling the public "streets. This consent or permission, whether it comes from

"the private owner, or the local government, is in all respects, "whether it be permanent or for a term of years, or at the will "of the one consenting, what the law denominates 'an ease-"'ment,' the duration of which is dependent only upon the "extent of the interest the grantor had authority to grant, and "the terms of the consent itself. That the power, whatever "it may be, is not an implied power, it is obvious. The Leg-"islature, it must be remembered, did not have the power, "independently of the city, to grant to any company the right "to enter upon and occupy the streets of Detroit. Now, if "it had granted the right to enter upon a particular street "and occupy it for such purposes without in terms mentioning "the consent of the city, it will be agreed that there was an "implied power granted the city authorizing it to consent; "but when, as in these two acts, it is expressly provided that "the consent of the city must be first obtained, and then the "city proceeds to expressly state how that consent shall be "given—that the terms and conditions must be such as are "satisfactory to the city, and that, after such consent has been "given and accepted, the right, franchise or easement shall "not be destroyed or unreasonably impaired by any regula-"tions or conditions to be made thereafter by the city—it "seems too obvious for argument that a power is expressly "given.

"An express statement of the mode in which an implied "power is to be exercised, and an express statement of what "shall be its effect when exercised, is an inexplicable "anomaly."

These cases well illustrate the fact that not the *nature* of *the grantee* governs, but of the thing granted. The grantee may be a short-lived corporation, while the thing granted may be longer lived or in perpetuity.

We call attention to the fact that the Court and laws of Idaho are very similar in the respects noted by the Court to those of New York cited, and that in Idaho such consent, such easement, must be by the local authorities, and that these "consents" were muniments of title to the enjoyment of the rights acquired thereunder, and that the limitation stated in

the charter was not operative as a limitation upon the power of the city to grant an easement in perpetuity.

The case of San Luis Water Co. vs. Estrada, etc., 48 Pac. 1075, is a case where a grant was made by the Legislature to individuals, and such a grant as could not have been made at that time in California to a corporation. This grant to Benrimo and others was transferred to a private corporation. The Court says: "The precise point made is that the power "to supply the city with water cannot be conferred directly "or indirectly upon a private corporation by special act. By "act of the Legislature entitled 'An Act to provide for the "'introduction of good and pure water into the town of San "'Luis Obispo,' approved March 28, 1872, a certain franchise "was granted to M. A. Benrimo, C. W. Dana and W. W. "Hays. Section 1 grants to these persons and their assigns "exclusive right for twenty-five years to supply the inhabi- "tants of the town of San Luis Obispo with water. No "other authority to sell is given in terms. The plaintiff is "a corporation duly authorized under the laws of this State "June 4, 1875, and alleges that it became the owner through "mesne conveyences of said franchises about the same date "last mentioned."

The Court distinguishes the case from others relied upon by the defense and says: "When the act here in question "was passed, the corporation had no existence in fact, or, so far as we know, in expectancy, and it was not formed until "three years later, and it does not appear that any of the "original grantees of the franchise had an interest in the cor- "poration, or that they caused it to be formed. It seems to "me that the only question presented, therefore, is whether "the corporation duly formed to supply the town (now city) "of San Luis Obispo and the inhabitants thereof with water, "could, under any circumstances, purchase and become the "owner of this franchise. Appellants do not attack the valid- "ity of the franchise to Benrimo and associates, but they say "that the assignment to the corporation was illegal and void, "and the corporation could not hold or exercise it. The "plaintiff corporation to which the transfer was made was "formed for the purpose and object of furnishing the town of

"San Luis Obispo and the inhabitants thereof with pure, "fresh water, and has been so engaged since its organiza- "tion."

"Among the powers of corporations given by our statutes "are: ' * * * (4) To purchase, hold and convey " 'such real and personal estate as the purposes of the cor- " 'poration may require, not exceeding the amount limited in " 'this part. * * * (8) To enter into any obligation or " 'contract essential to the transaction of its ordinary affairs, " 'or for the purposes of the corporation.' Civil Code, sec- "tion 354. The grant to Benrimo and his associates was also "to their assigns. There can be no doubt but that they "might, by the terms of the grant, sell or assign the franchise. "It seems to me too plain to require argument that the pur- "chase by the plaintiff is strictly and directly within its pow- "ers, and contributed necessarily and directly to its objects "and purposes."

Board of Mayor, etc., of Morristown vs. East Tenn. Tel. Co., 115 Fed. 304, decided this year in the Circuit Court of Appeals, 6th Circuit, is a case in point both as to powers of the city to grant the franchise and also as to the grant being irrevocable after acceptance. And in this case the city also denied the authority of the company as a foreign corporation engaged in a competitive business to acquire the right and franchises of the local company, a domestic corporation. And, although the charter of the city did not in express terms deal with the question of the grant of privileges or franchises in the streets or provide in so many words that the city should have control over its streets, yet the Court held that it would not disagree with the Court below in holding that the powers in reference to streets and alleys were so numerous and sweeping as to be equivalent to a general power.

And the Court held that the consent to the occupancy of the streets by the poles and wires of the company for the pur-

pose of maintaining a public telephone system, was the grant of an easement in the streets, and the conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than a legislative, was irrevocable after acceptance. Citing 64 Fed. 628; 76 Fed. 296; 96 Fed. 113, and 77 Fed. 501.

State vs. Topeka Water Co., 60 Pac. 337, decided by the Supreme Court of Kansas in 1900, holds that a corporation of the State of Kansas as a water company could sell the privileges and rights, conferred by the city, rights obtained not from the State by its charter, but subsidiary in their nature, and by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite. That these secondary franchises are in nature of property and do not revert to the State on the death of the corporation. Citing U. P. R. R. Co. vs. Lincoln Co., 1 Dill. 325; Federal Cases No. 14, p. 387.

Arthur vs. Commercial Railroad Bank of Vicksburg, 9 Smedes & Mar. 393.

Memphis & L. R. Co. vs. Railroad Coms., 112 U. S. 619. Book 28, Law. Ed. 837.

Treadwell et al. vs. Salsbury Manufacturing Co., 7 Gray 393.

Morgan vs. Louisiana, 93 U. S. 217. Book 27, Law. Ed. 860.

State vs. Western Irrigating Canal Co., 40 Kan. 99; 19 Pac. 349.

Joy vs. Road Co., 11 Mich. 164.

City of Detroit vs. Mutual Gas Co., 43 Mich. 594, 5 N. W. 1039.

Fietram vs. Hay, 122 Ill. 293; 13 N. E. 501.

And, continuing, the Court says: "The ordinances accepted by the water company were in the nature of contracts, and were property within the meaning of the law. "See Bridge Co. vs. Dix, 6 How. 534, 12 Law. Ed. 535; Long "Island Water Supply Co. vs. City of Brooklyn, 166 U. S. "685, 17 Sup. Court. 718, 41 Law. Ed. 1165; New Orleans "Gaslight Co. vs. La. Light & Heat Producing & Mfg. Co., "115 U. S. 650, 6 Sup. Court 252, 29 Law. Ed. 516; "Thomp. Corp., sec. 6747; Railway Co. vs. Campbell, 59 Pac. "1051, 61 Kan. ——. Under our statute, the words 'per- "'sonal property' include money, goods, chattels, evidences of "debt, and things in action; and the word 'property' includes "both personal and real property. Section 8, cl. Gen. St. "1897. In the making of said contracts evidenced by ordi- "nances, the city was not exercising legislative or govern- "mental powers, but quasi private power conferred by law, "and in such matters it could exercise its business affairs gov- "erned by the same rules as apply to an individual or a private "corporation. First Dill Mun. Corp., sec. 27, and cases "cited; Illinois Trust & Sav. Bank Co. vs. City of Arkansas "City, 22 C. C. A. 117, 76 Fed. 271, 34 L. R. A. 518."

The nature and source of the waters of plaintiff make them peculiarly of a strictly private nature. They are created or developed by deep wells on lands owned first by the Eastmans and then by their said "successors in interest in their water "works." They are not appropriated waters.

Southern and others vs. San Diego Flume Co., 112 Fed. 228, is a case throwing a strong side light on some phases of the case at bar. The learned Judge in explaining the basis of former decisions, now overruled, in which it had been held that water appropriated under the Constitution and laws of California for sale, rental or distribution is charged with a

public use, and that where a corporation appropriates and furnishes water for such purposes, the rates must be established in pursuance of law, and that they could not be fixed by private contract, and that nothing could be charged to the legal rate, refers to waters *appropriated* under the provisions of the Constitution of California of 1879.

And the Court calls attention to the fact that "defendants "by their answer aver that the rights acquired by the com- "plainant company 'were acquired by it as an appropriation " 'under the Constitution and statutes of the State of Cali- " 'fornia, and of the acts of Congress of the United States, " 'the contract cannot be treated as an ordinary contract be- " 'tween individuals, irrespective of the duties and obliga- " 'tions of the defendant to all of its consumers.' "

And the Court says: "But for adverse rulings, * * * "I should concede the potency * * * of the suggestion "that no 'ordinary' contract nor any other sort of a contract "with private individuals could be made in respect to water "appropriated under the Constitution of California of 1879."

In the case at bar, no such difficulty is presented, as these waters are *unappropriate, private well waters*, concerning which many enactments and rules of law applicable to appropriated waters have no application.

And yet, even in regard to *appropriated* waters under Constitution and laws similar to those of Idaho on same subject, the California Courts hold, and the Federal Courts have followed them, that an appropriator of water for sale, rental of distribution may make valid contracts with customers for furnishing water which are not affected by subsequent action of Boards of Supervisors in fixing rates under statute. How much plainer is it that this may be done when a person owns unappropriated, private waters!

THE NATURE AND SOURCE OF THE WATERS.

The nature and source of the waters of plaintiff make them peculiarly of a strictly private character. They are created or developed by deep wells on lands owned first by the Eastmans and then by their said "successors in interest in their "water works." They are not *appropriated* waters. They are not from waters *subject* to *appropriation* under the Constitution and laws of Idaho. They are as much *private* property as the soil of the land where the wells were made by deep boring.

Cardelli et al. vs. Comstock Tunnel Co., 66 Pac. 950.

Willow Creek Irrigation Co. vs. Michaelson, 60 Pac. 943.

On page 944 the Court says: "The statute, therefore, "cannot be so interpreted as to include a stream flowing from "a bog or marsh like the one in the case at bar, which did "not make its appearance upon the surface until after the land "had been purchased from the Government by a private indi-"vidual. * * * At that time the water, if it existed at "all, was percolating through the soil or flowing in a sub-"terranean stream having no definite or known channels, "courses or banks. Waters so percolating and flowing form "a part of the realty and belong to the owner of the soil. A "conveyance or grant by the United States of any part of the "public domain to a person, natural or artificial, carries with "it the right of filtrating or percolating water, and to streams "flowing through the soil beneath the surface, through any "undefined and unknown channels, just the same as it carries "with it the right to the rocks and minerals in the ground "which have not been reserved in the instrument or convey-"ance or by statute. Water, intermingling with the ground

"or flowing through it by filtration or percolation or by chem-
"ical attraction, is but a part of the earth, and has no charac-
"teristic or ownership distinct from the land itself. In the
"eye of the law, water so commingling, flowing or motion-
"less, underneath the surface, is not subject to ownership
"apart and distinct from the soil. * * *"

Crescent Mining Co. vs. Silver King Mining Co., 54 Pac. 244; the Court decides: "The ordinary rules of law apply-
"ing to the appropriation of surface streams do not apply to
"percolating water and subterranean streams with undefined
"and unknown courses and banks."

Slosser vs. Salt River Valley Canal Co., 65 Pac. 332.

Some States have held that the right to divert water from a public stream depends wholly upon the use which is made of it and is measured by the rights of its users and appropriators. This is the case in Arizona.

On page 336, above case, the Court says: "Water, being
"public property in any running stream, continues to be public
"property even when diverted for beneficial use, and remains
"such until actually applied to such uses. Our statutes do
"not recognize the right of ownership of water, as distinct
"from its use or application. Whenever an appropriator of
"water ceases to use for a beneficial purpose any water which
"has its source in a public stream, his power or authority to
"control the same ceases."

Such principles have been adopted by a few States only, and such language can have no application to waters developed by deep boring of wells upon the lands owned by those making the wells.

Southern Pac. R. Co. vs. Dufour, 19 L. R. A. 92 (95 Cal.).

In speaking of a spring fed by percolating waters and not

by any running stream of water, the Court, on page 93, says: "There was no water on the spot to which plaintiff could "acquire the right of use from the statutory appropriation or "adverse user, and this principle is supported by unquestioned "authority.

"In Delhi vs. Youmans, 50 Barb. 316, the matter is exten-"sively discussed, and Justice Boardman there said: 'The " 'law controlling the rights to subterranean waters is very " 'different from that effecting the rights of surface streams. " 'In the former case the water belongs to the soil, is part of " 'it, is owned and possessed as the earth is, and may be used, " 'removed, and controlled to the same extent by the owner.' "

And the Court, continuing on page 94, says: "It is ap-"parent that title to the land carried title to the water, and "plaintiff's acts of attempted appropriation created no right or "easement; for no water was present which could be the sub-"ject of appropriation."

Hanson vs. McCue, 10 Am. Rep. (42 Cal.) 299; on page 301 the Court says: "It not appearing that the spring here is "supplied by any defined flowing stream, it must be presumed "that it is formed by the ordinary percolating of water in the "soil. * * * Water filtrating or percolating in the soil "belongs to the owner of the freehold, like the rocks and min-"erals found there. It exists there free from the usufructuary "right of others, which is to be respected by the owner of an "estate through which a defined stream of water is found to "flow. The owner may appropriate the percolation and fil-"tration as he may choose and turn them to profit if he can. "To hold otherwise would be to hold that the plaintiff here "could lawfully claim the right to convert the land of McCue "into a mere filterer for his own convenience. 'Such a claim' "(said the Supreme Court of Pennsylvania in 23 Penn. 528) " 'if sustained would amount to a total abrogation of the right " 'of property.' Roath vs. Driscoll, 42 Am. Dec. 352; the "Court decides that 'water standing or percolating in the soil " 'is part of it, constituting one of the natural advantages of " 'the land, which each one is entitled to use as fully and freely " 'as he can by sinking wells.' "

Fort Morgan Land & Canal Co. vs. South Platt Ditch Co.,

36 Am. St. Rep. 259 (a Colorado case). The Court holds in that suit that the water of every natural stream is the property of the public. Private ownership in the water is not recognized, but the right to divert water and apply it to beneficial uses is expressly guaranteed by the Constitution. In notes to this Colorado case, cited on page 263, it is shown that in Wheeler vs. Northern Colo. Irrigation Co., 10 Colo. 582, that "the Colorado Constitution dedicates all unappro-"priated waters in the natural streams of the State to the use "of the people. The use of water in a flowing stream is open "to all."

In Strickler vs. Colorado Springs, 16 Colo. 61, the Court held that "the prior appropriator's right to use the water of "a stream is a property right which he may transfer by sale."

Metcalf vs. Nelson (8 S. D.), 59 Am. State Rep. 746, the Court decides: "Subterraneous waters not flowing in a de-"fined course or channel, but percolating and seeping through "the surface, is a part of the realty. It belongs to the owner "of the land as much as the rocks and stones in it. * * * "It will be presumed, in the absence of evidence, that a spring "is formd and fed by percolating waters rather than by the "outbreak upon the surface of the earth of a subterranean "stream. The owner of land upon which a percolating stream "appears is entitled to the waters thereof, and may recover "damages from a person seeking to carry them away."

In a note to this case, found on page 750, the editor says: "The principles of law which govern the right to waters flow-"ing upon the surface of the earth are *unapplicable* to *waters* "*which are beneath its surface and percolate through the soil*, "and the water which is held by the soil, whether sand or sand-"stone, in a state of percolation, is a portion of the soil itself "and belongs absolutely to the owner of the land. He may "appropriate and divert such water at his pleasure." Gould vs. Eaton, 111 Cal. 659.

Tampa Water Works vs. Cline, 37 Florida 586.

Wheelock vs. Jacobs, 67 Am. St. Rep. 659. (This case is found in the 70 Vermont, 162.) The Court decides: "Per-"colating waters are parts of the earth itself, as much as the "soil and the stones, with the same absolute right of use and "appropriation by the owner of the land."

Crescent Mining Co. vs. Silver King Min. Co., 70 Am. St. Rep. 810 (a Utah case). This case holds: "That the ordi-"nary rules of law applying to the appropriation of surface "streams do not apply to percolating waters and the subter-"ranean streams with undefined and unknown courses and "banks."

On page 814, the Court says: "Under such a state of "facts, the law seems to be well settled that water percolating "from the soil is not, and cannot be, distinguished from the "soil itself. The owner of the soil is entitled to the waters "percolating from it, and such water is not subject to appro-"priation. The ordinary rules of law applying to the appro-"priation of surface streams do not apply to percolating water "and subterranean streams, with undefined and unknown "courses and banks. When water percolates through and un-"der the surface of the earth, upon land belonging to one person "and comes to the surface just before it empties itself upon the "land of another, the owner of such land has no right to de-"mand that such percolation shall continue. It is held that "a person may lawfully dig a well on his own land. * * *"

On page 818 the Court says: "We conclude that section "2780 of the compiled laws of Utah of 1888 was intended to "apply to natural water courses having a natural source of "supply, and that it does not apply to percolating waters "arising in the land of the owner and carried through arti-"ficial drains constructed by the owner for the purpose of im-"proving the property and for the convenience of the owner."

Tampa Water Works Co. vs. Cline, 53 Am. St. Rep. p. 262.

Section 1 of Art. XV of Idaho Constitution limits the

kinds of waters whose sale, rental or distribution is therein declared to be a public use, and subject to control and regulation by the State to *appropriated* waters.

Section 2711 of the Revised Statutes, which the defendant claims obliges the plaintiff to furnish water for street sprinkling purposes free of charge, describes the nature of the persons to whom it applies as *corporations*, while sections 2710 and 2712, which are to be considered along with section 2711, show how such corporate persons may obtain use of streets and franchise to supply inhabitants and fix rates. We have already attempted to show that section 2711 did not apply to the plaintiff, or to any of its predecessors, for the reason that the grant, easement and franchise under which the water works were operated was obtained not by any corporation from the State or city, but by individuals, and was property appertaining to and commingled with the water works property and that it had the same nature in the hands of their successors that it had in the hands of the Eastmans, where it first became property or a property right.

We now insist that under the Constitution of Idaho, this well water is not under State control or regulation as to sale, rental or distribution by its very nature. It is simply private property. The Legislature had in mind, in enacting section 2711, common waters, surface waters, waters that had been or might be appropriated, waters of a public nature, and waters supplied by and from natural and usual sources. It was not within the legislative intent that private artesian wells obtained and developed by deep boring into the rocks, on an average of 400 feet, were to be included in the words of the section, "so long as the supply permits." The waters in the minds of the Legislature were the waters where there *was a*

supply from some natural sources. In the sense meant by the Legislature, there was, for these water works, no supply of water. But it was created and developed at great expense because there was no supply. Suppose the section, instead of being limited to corporations, should have declared that individuals who became members of a firm, "formed to supply "water to cities and towns must furnish pure, fresh water to "the inhabitants thereof for family uses, so long as the sup- "ply permits, at reasonable rates and without distinction of "person, upon proper demand therefor; and must furnish "water to the extent of their means in case of fire or other "great necessity, free of charge," would it then be contended that the legislative intent included waters obtained from no natural source of supply, but obtained by boring twenty-nine wells to the depth of 400 feet? Then, if by such deep borng pure artesian cold water was found in twenty-six wells and artesion hot water in three wells, would it be said that these artesian hot and cold waters were what were in the contemplation of the Legislature when it used the words "so long "as the supply permits"? We think not.

Again, the obligation of furnishing free water "in case of fire and other great necessities" is limited to "within the extent of their means." What means? Does it mean that if the owners of the water works are rich enough to get the water by some extraordinary and expensive methods, such as shipping it in by railways (which they might do in case of necessity for family use), that then it was "within the extent of their means" to also ship in water for sprinkling o fthe streets? We think "within "the extent of their means" should be interpreted to mean and to include such waters as they had on hand after domes- uses were supplied, and not to mean that the owners must go

into their pockets for the special purpose of obtaining water for the sprinkling of streets by the running of steam engines and of pumps. We think the owners were not to be obliged to hire men, buy engines, burn coal worth $8 per ton, to run pumps, to furnish water free for street sprinkling purposes.

The testimony shows that every gallon of cold water used for street sprinkling had to be thus put into the water works pipes by such pumping. Nor do we think the section ever contemplated any use of hot artesian water. It is shown that the waters of the company are expensive waters, are pure waters, and that the demand for them is greater than the supply, except by means of extraordinary labor and great expense. It is shown that the city of Boise is abundantly supplied with river, ditch and well waters suitable for street sprinkling, not fit for drinking or for domestic use and of no value except the cost of taking up into sprinkling wagons. That it has an abundance of cheap water. This is not denied. But defendant says (page 65K) in effect that the taking of the waters for street sprinkling was a great necessity because the city is in a dry and arid region, and "that the said water "of plaintiff was, under the law, of no value to plaintiff or "to the Idaho company." "That, by reason of such neces- "sity, the Artesian Hot & Cold Water Company, as such cor- "poration, organized, formed and authorized as aforesaid, "was at all times, and is, charged with the duty and obliga- "tion of furnishing this defendant water for fire and other "great necessities, free of charge, and that without regard to "the other possible means of securing water for such pur- "poses." We quote this from defendant's answer, not be- cause it is a denial, nor as evidence, but to show its position and argument as to its "great necessity." Plaintiff contends and its predecessor contended that there was no such "great "necessity" on the city for water for street sprinkling as is

contemplated by this provision of the statute. The mere fact that the streets need sprinkling does not make it necessary for the city to take our very expensive waters when it has an abundant supply of cheap water—water costing nothing but the trouble of taking it. The word "necessity," we say, as here used, included both the necessity to have the streets sprinkled and the necessity to take plaintiff's waters, instead of the public waters in, under and about the city, and that there was no necessity to take what cost very much when the city was supplied with what cost nothing.

Defendant takes the further position that the plaintiff should charge rates high enough for water for domestic use so that it can afford to furnish the waters used on such streets as are sprinkled free of charge. That, in effect, all the customers of plaintiff are to be charged to pay for sprinkling the portion of streets sprinkled, although a large portion of such streets are in parts of the city where pliantiff does not nor did its predecessor furnish any water to the inhabitants, but where the water is furnished to the inhabitants by its competitor in business, said Sonna.

This takes us to another ground of our objection to furnishing free water for the sprinkling of streets. It is that the law and public policy of Idaho make the sprinkling of streets a local benefit to be paid for by the owners of lots abutting on portions of streets sprinkled. Up to 1897, what water was used for street sprinkling was paid for or furnished by such abutting owners. Up to that time, the city had never had anything to do regarding waters for such purpose. In

1897 the Legislature amended the charter of the city and provided that "the Mayor and Common Council shall have "full power and authority to provide for the sprinkling, "cleaning and repairing of the streets at cost of owners of "abutting property." After the passage of this act, and for the years 1897, 1898 and 1899, the city did so provide, and what waters were taken for street sprinkling from said water works were taken under contract between the city and the owners of the water works by which the city was to and did pay for the same. And the city assessed the cost of the same for each of these years to the owners of such abutting property and collected the same both by legal proceedings in the Courts and otherwise.

We claim that if section 2711 ever implied (and it does not so state) that water for street sprinkling was to be furnished free to the city, while in fact it was, as defendant says, to be paid for by all the inhabitants who were customers of water company, such implication no longer exists, but was repealed by such charter amendment of 1897. It is unjust that customers who reside on streets not sprinkled have to pay for sprinkling those streets which are remote from them, and that this is not the present policy of the law, and if it ever was, by implication that such amendment now makes it a local benefit to be paid for by those benefited. The position of defendant in this regard as shown on page 64 of record, is not in harmony with the charter, since the amendment of 1897. We may presume that in legislating for the city, the Legislature took into consideration the fact that the sprinkling of streets in the city had theretofore been done and the water furnished therefor by the owners of abutting property, and therefore, in placing the control, designation and regula-

tion of the same in the city government, it left the cost and expense of the same where usage and custom had placed it, with the owners of abutting property .

FOREIGN CORPORATIONS IN IDAHO—RIGHT TO DO BUSINESS—STATE COMITY.

It is of the public policy of the State of Idaho to extend the right, privilege and power to do business therein to foreign corporations, and to give them these benefits to the same extent enjoyed by domestic corporations.

Section 10 of Article XI of the Constitution of Idaho recognizes this in requiring foreign corporations to have known places of business, and an authorized agent or agents, upon whom process may be served, and providing that they shall enjoy or exercise no greater rights within the State than could be enjoyed by similar corporations created under the laws of Idaho.

Rev. Statutes of Idaho, 1887, section 2653, provides that foreign corporations doing business in Idaho must designate some person residing in the county in which the principal place of business of the corporation is conducted, upon whom process may be served, and must file in the office of Secretary of State and with the Clerk of the county a copy of such designation, and then reads: "That such foreign corpora-"tions complying with the provisions of this section shall "have all the rights and privileges of like domestic corpora-"tions, including the right to exercise the right of eminent "domain, and shall be subject to the laws of this territory "applicable to like domestic corporations."

On page 88 of the transcript it reads: "It is here admitted "by the defendant that the plaintiff incorporation has filed "with the Secretary of State, and with the Clerk and Recorder "of Ada County, a paper designating its principal office and "place of business in Idaho as Boise City, Ada County, and "appointing and designating B. S. Howe its agent, upon "whom service of process can be made in compliance with the "laws and Constitution."

Demarest vs. Grant, 13 L. R. A. 854. This is a new York case decided in 1891. It concerns a West Virginia corporation, incorporated by persons residing in the State of New York. On page 855 the Court says: "Counsel for plaintiff "upon this evidence moves to strike out the certificate of in-"corporation, and of the testimony relating thereto, on the "ground that 'the directors of the concern were residents of "'New York, and that under the statute of West Virginia "'it was necessary, in order that the corporation be duly in-"'porated, that the directors of the concern should be resi-"'dents of West Virginia unless a special resolution were "'passed by the corporation permitting persons of any State "'to be such directors.' The motion was denied; and there-"upon, on motion of counsel for defendants, the complaint "was dismissed because no cause of action was proved against "the defendants personally. There was sufficient evidence of "user to make it clear that the company had accepted its char-"ter, with all its privileges and liabilities, whatever they "might be. * * * As to the other points which have been "actually raised by the motion to strike out the certificate (of "incorporation), we think a proper disposition was made of "them by the Court below.

"By the statute of West Virginia, the incorporation pre-"cedes the election of directors. After the incorporation, and "subsequent to the issuing of the certificate thereof by the "Secretary of State, the corporators named therein, or a "majority of them, are directed by statute to appoint a time "and place for holding a general meeting of the stockholders, "to elect directors, make by-laws, and transact other busi-"ness. * * * The counsel for plaintiff was therefore in "error in his statement as to the law of West Virginia.

"We come, then, to the question whether, upon the facts "already set out, this corporation was so far valid as to be "entitled to recognition as such in the Courts of our State. "The plaintiff says it clearly appears that the corporators "thereof were citizens of New York, and the corporation was "formed by them in the State of West Virginia for the sole "purpose of doing business out of that State and in the State "of New York, in which latter State its principal office was "also to be located.

"These facts, he says, conclusively prove the invalidity of "the West Virginia corporation, so far, at least, as this State "and its citizens are concerned. If mistaken in that view, he "still urges that such facts render it a question for the deter- "mination of the jury whether the corporation was attempted "to be made in good faith or as a mere evasion and in fraud "of the laws of West Virginia or New York. He claims, "if the jury should find the purpose was one of evasion, that "in such case the corporation would furnish no defense, and "the defendants would be liable as individuals. We are quite "clear that the case should not be submitted to a jury to pass "upon the question of evasion as a matter of fact. If it were, "we find different juries coming to different conclusions upon "the same facts, and we should have a corporation or no "corporation according to the view of the jury may take of "such facts. * * * It must be a corporation as to all "persons with whom it has business dealings or as to none. "In other words, it must be a question of law instead of fact. "The Courts of any country recognize foreign corporations "through what is termed 'National or State comity'; but "whether such recognition shall be given must be decided by "the Courts of the country where the corporation seeks to do "business. In our State, as in others, it is a question of "domestic policy, and what that policy is must be deter- "mined by an examination of our legislation. If we find any "direct enactment on the subject it is our duty to obey it "and in its absence we must determine the question with "reference to our general legislation, and to the circumstances "which surround us as a great and growing commercial com- "munity, having need of and employing large amounts of "combined capital and for whose prosperity and growth it is "of the utmost importance that such capital should have the

"greatest facilities extended it for useful employment, with "reasonable and proper personal exemptions from liability. "We can find no reason for a domestic policy that should ex- "clude from recognition by our Courts, foreign corporations "generally. It may be safely said there can be no such do- "mestic policy at the present day in a civilized State. The "question then arises, Shall we go behind the certificate of "incorporation or charter of a foreign corporation for the "purpose of inquiring under what circumstances, and for "what purpose outside the charter, it was incorporated? "This can only be claimed on the ground that the charter "was obtained in fraud or evasion of the laws of the State "which granted it, or for the purpose of evading the pro- "visions of our own laws. It is plain there was in regard to "the procurement of this charter no fraud upon or evasion "of the laws of West Virginia, even if we should admit that "such fact would constitute good ground for our refusal "to recognize such corporation, although no proceedings have "been taken to annul its charter in the State which granted it. "This point is by no means clear. However that may be, "it is impossible not to see that the State of West Vriginia "has adopted a policy which favors the formation of corpora- "tions within her borders, and pursuant to her laws, while "the members and officers may be non-residents, and where "the principal business of the corporation is to be performed "outside of the confines of the State.

"The agreement which was signed by the corporators in "this case, and duly acknowledged and presented to the Sec- "retary of State of West Virginia, clearly showed that the "corporators were residents of New York, and that the prin- "cipal office of the corporation was to be in New York; and "the inference was a fair one that the principal business of the "corporation was also to be conducted in New York. The "Secretary of State to whom the papers for the organization "of the corporation were presented, was compelled to pass "upon and decide the question whether they conformed to "the laws of West Virginia, before he received or filed them, "or gave the certificate of incorporation. He did not pass "upon the question and did thereupon issue the certificate "of incorporation under the great seal of the State and at- "tested by his official signature. So far as the laws of West

"Virginia are concerned, it is plain that the corporators "thereupon became a corporation, and in that State the cer- "tificate was, by the laws thereof, evidence of the existence "of such corporation. There was no fraud or evasion of the "law of West Virginia in thus becoming incorporated. The "reference to her laws above made shows conclusively that

"the formation of corporations thus composed, and for the "purpose of doing their principal business outside the limits "of that State, was contemplated in those laws. This cor- "poration was beyond all question legally incorporated, and "entitled to recognition, in the State of West Virginia. Un- "less, therefore, it can be said that the acts of our citizens "in procuring an incorporation under the laws of West Vir- "ginia for the purpose of doing business here were, as a "matter of law, a fraud and an evasion of our own laws, and "hence in conflict or inconsistent with our domestic policy, "such foreign corporation is entitled to recognition and pro- "tection in our own tribunals. Merrick vs. Van Cantwoord, "supra.

"It is urged that such acts are thus inconsistent and in "conflict with our policy, because citizens of our own State "are in that way enabled to evade our own laws relative to "home corporations, and to avoid personal liability by incor- "porating under the laws of foreign States, which may be "more favorable to members than are our own laws. I "think when this claim is examined in the light of our own "legislation, it will be seen that there is no substantial basis "for it to rest upon. An examination of our laws shows that "it is, and for many years has been, the policy of this State "to enlarge the facilities for the formation of corporations. "General laws are on our statute book for the formation of "corporations of almost every conceivable kind, and under "some of them a corporation of the kind mentioned in this "case could readily be formed. The freedom from personal "liability would be as great, and could be as easily attained, "under our own as under the laws of West Virginia. The "security of the creditor would not be substantially greater "in the case of the domestic than in that of the foreign cor- "poration. In the latter the creditor has the remedy by "attachment, and he can obtain about as easy access to its "property as if it were domestic instead of foreign. There

"is really nothing to evade by incorporating under a foreign "law. No harmful results flow to a creditor or to the com- "munity here by such incorporation. Where the corporation "formed under another jurisdiction comes here to do busi- "ness of a kind which we permit to be done by corporations, "and where our laws provide for incorporating individuals "for the purpose of doing that business, it is difficult to see "how the terms 'evasion' and 'fraud' can be properly applied "to acts of our citizens whereby they obtain incorporation in "another State. When they come into our State to do busi- "ness, they must conform to our laws relating to foreign "corporations, and comply with the terms laid down by us "as conditions of allowing them to transact business here. "In the case of many kinds of corporations, such conditions "have already been imposed by our laws; and if there be any "kind where none is imposed, it is conclusive evidence that "up to this time the Legislature has not thought it conducive "to the true interests of the State and its citizens to impose "them. I do not intimate that it is necessary for a State "to expressly, by statute, exclude foreign corporations from "acting within its jurisdiction. The policy of the State may "exclude them, and that policy may be clearly established by "reference to the general legislation of a State. I find none "such in the laws of this State.

"It has been urged that the easy way which our laws pro- "vide for forming corporations is itself a reason why we "should not recognize as a corporation those of our own citi- "zens who have gone to another State for the purpose of "incorporating themselves under the laws thereof, to do busi- "ness in our own State as such corporation. We think there "is very little force in the argument. The public policy which "we see in our State, as evidenced by her law upon the sub- "ject of the formation of corporations, is one which looks "to their ready and easy formation as a means of transacting "business with an accumulation of capital, and an exemption "from personal liability to the largest extent consistent with "reasonable supervision by the State. The facilities for in- "corporation offered by this State are not the result of any "desire to promote the formation of corporations here as "against their formation in other States. They are offered "because of a policy on our part which urges upon the State "the propriety of furnishing them as one means of control-

"ling the business done by them, and keeping it within our "borders. If in any particular case it is thought by those "interested in the matter that the business can be done in our "own State and by our own citizens with greater facility "under the form of a foreign corporation than under that of "a domestic one, there is no public policy which forbids its "transaction under such form. The supervision of a foreign "corporation by this State may easily be exercised by impos- "ing terms as a condition of permitting it to do business here. "The absence of any such terms in our legislation forms no "reason for refusing to recognize the corporation. The power "rests with the Legislature to say whether any, and, if so, "what, terms shall be imposed upon such corporations as a "condition of granting them permission to do business here. "Those terms can only be imposed by the Legislature; and in "their absence our Courts ought not merely on that account "to refuse to recognize a foreign corporation. In the absence "of legislation, our Courts must either refuse absolutely, or "else they must recognize the right of such corporations to "come to this State and do business here. The Courts can- "not themselves impose terms or conditions."

Oakdale Mfg. Co. vs. Garst, 49 Am. St. Rep. 184 (18 Rhode Island).

This case decides: "That it is not a violation of the laws "or policy of the State of Rhode Island for citizens thereof "to procure an act of incorporation in another State for the "purpose of carrying on business as a corporation in Rhode "island."

The third point made by the defendant was, "that one pur- "pose of the contract was to form a corporation in violation "of the laws of this State."

On page 787 the Court says: "With reference to the "third ground of defense, it does not appear that the agree- "ment in any way violates the laws or policy of this State, "and if it did, the defendant, being a party to it, could not "set it up: Chafee vs. Sprague Mfg. Co., 14 R. I. 168. The "mere fact that the complainant corporation is created under "the laws of the State of Kentucky is not sufficient to war- "rant a dismissal of its case, for foreign corporations have "frequently been recognized as suitors in this Court: Wind- "ham County Bank vs. Kendall, 7 R. I. 77; Howe Machine

"Co. vs. York, 11 R. I. 388; Boston, etc., Smelting Co. vs. "Smith, 13 R. I. 27, 43 Am. Rep. 3; Singer Mfg. Co. vs. "King, 14 R. I. 511. They are also recognized as doing "business here by comity." Pierce vs. Compton, 13 R. I. 312. "While the fact that citizens of Rhode Island go to Kentucky "for an act of incorporation, is one that naturally excites "curiosity, if not suspicion, as to the motives and good faith of "the concern, yet, so long as it pursues a lawful business and "violates no law of this State, we do not see how we can "refuse to recognize it. True, the advantage of yearly state- "ments and liability of stockholders given to creditors under "our statutes are wanting; but that is a matter for those who "deal with the corporation to consider. We can hardly deny "the right of a foreign corporation to do business in this "State, upon considerations of public policy, when our own "statutes (Pub. Laws, c. 1200) expressly provide for cor- "porations formed in this State for carrying on business out "of the State.

Lancaster vs. Amsterdam Improvement Co., 24 L. R. A. 322. (This case is found in 140 N. Y.) The case decides: "The right of a defacto corporation to transact business under "a franchise which another State has attempted to confer, "cannot be questioned by individuals. A foreign corporation "incorporated for the purpose of dealing in the purchase and "sale of real property, is not prevented by the statutes or "public policy of the State of New York from transacting "such business in that State. A foreign corporation can "transact any lawful business in New York State which a "non-resident natural person can do."

People, State of Illinois, *ex rel* Stephens vs. Fidelity & Casualty Co., 26 L. R. A. 295.

On page 298 the Court says: "It is admitted that our "statutes do not in express terms prohibit a company from "doing more than one kind of insurance. The rule is that, "where there is no positive, prohibitive statute, the presump- "tion under the law of comity prevails, that between the States "of the Union, is that the State promises a corporation organ- "ized under a sister State to do any act authorized by its

"charter, or the law under which it is created, except when "it is manifest that such act is obnoxious to the policy of the "law of this State. In Stevens vs. Pratt, 101 Ill. 206, it was "held by this Court that mere absence of legislation authoriz-"ing the formation of a particular class or kind of corpora-"tions does not show that it is against the public policy to "create such corporations, but that such public policy must "be expressed in some affirmative way."

"In Cowell vs. Colorado Springs Co., 100 U. S. 55, 25 L. "Ed. 547, the Supreme Court of the United States said: " 'That the policy of the State or Territory does not permit " 'the business of the foreign corporation in its limits or allow "'the corporation to acquire or hold real property must " 'be expressed in some affirmative way; it cannot be inferred " 'from the fact that its Legislature had made no provision " 'for the form of similar corporations or allows corporations " 'to be formed only by general laws. Telephone companies " 'did business in several States before their Legislatures had " 'created or authorized the creation of similar corporations; " 'and numerous corporations existing by special charter in " 'one State are now engaged, without question, in business in " 'States where the creation of corporations by special charter " 'is forbidden.' "

Lake View Land Company vs. San Antonio Traction Co., 16 Am. and Eng. Corp. Cases, 1. (Decided by the Supreme Court of Texas in 1902. Reported 66 S. W. Rep. 766.)

This case holds that a foreign corporation having power under its charter to acquire and hold real and personal property may acquire title to such property in the State of Texas. It also holds that a contract with a street railway company is assignable. The question stated on page three: "When ap-"pellant bought the land and appurtenances and above con-"tract and other privileges belonging to the New England "company, did it obtain thereby the right to maintain a suit "for damages for any breach of the contract that would have "been held by this vendor of the New England company?

" * * * Did the purchase of the contract by a foreign "corporation, before it procured a permit to do business in "Texas, confer upon the purchaser the right to sue for dam- "ages arising out of the breach of the contract? Is the con- "tract such as by law may be assigned so as to give the "assignee the right of action for its property? There is no "law in Texas which prohibits corporations created in other "States to purchase and hold land and personal property in "this State, not authorized by their charters or the laws under "which they were created. * * * The purchase of the "contract, together with the lands invested the appellant with "all the rights which the original obligee would have had "under the same circumstances."

Revised Statutes of Idaho, 1887, section 2827, reads: "Any "person, whether citizen or alien, may take, hold and dispose "of property, real or personal."

EVIDENCE OFFERED AND REJECTED.

On the trial, plaintiff, after having proved that all the water used for street sprinkling had to be pumped at extra expense, and that the city had notice of this, asked the witness (page 92) "if the cold water system was paying dividends or mak- "ing profit?" This was asked on the theory that if it was not being operated at a profit, and if the city knew this and the water taken for street sprinkling required extra work and expense, that then it was not, and the city knew it was not, "within the extent of the means" of the company to furnish the water, and so the taking was wrongful even if the section, 2711, was in force against the company.

The defendant objected to the question on the ground that it was irrelevant and immaterial, for the reason that it was merely a question of fixing rates. The objection was sustained, to which plaintiff excepted.

Miners Ditch Co. vs. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

On page 323 the Court says: The deed was admissibly in "evidence, and, being in, was prima facie of the regular and "due execution of the deed. This point is settled by the de- "cisions. Angell and Ames state the rule deduced from the "authorities thus: 'Where the common seal of a corporation " 'appears to be affixed to an instrument and the signatures " 'of the proper officers are approved, Courts are to presume " 'that the officers did not exceed their authority and the seal " 'itself is prima facie evidence that it was affixed by the " 'proper authority.' "

Leggett et al. vs. N. J. M. & B. Co., 23 Am. Dec. 728.

The case decides that "the appearance of a corporate seal "to a writing is evidence that it was affixed by the proper "authority." On page 740, note to the above case, the editor says: "Ownership of property, whether real or personal, "carries with it the same general power of disposition in cor- "porations as in individuals, except where the powers are re- "strained by statute or by considerations of public policy.

"Angell & Ames on Corporations, sec. 187.

"Says Campbell J. in delivering the opinion of the Court, "in White Water Valley Canal Co. vs. Vallette, 21 How. U. "S. 424: 'It is well settled that a corporation, without special " 'authority, may dispose of lands, goods and chattels, or of " 'any interest in the same, as it deems expedient and in the " 'course of its legitimate business may make a bond, mort- " 'gage, note or draft. * * * These cases establish be- " 'yond question the proposition that *jus disponendi* is as nec- " 'essary an incident of ownership in corporations as in indi- " 'viduals. Hence, if a corporation possesses only such pow- " 'ers as are expressly granted, or as are necessary to carry " 'out those so granted, it has, nevertheless, the power of " 'buying and selling, without express grant, unless restrained " 'by its charter or otherwise, because that power is incident

" 'to its express powers. It might, therefore, in the absence " 'of any such restraint, sell whatever it has the right to own. " 'It may sell all its corporate properties for a corporate or " 'lawful purpose.'

"Sargent vs. Webster, 13 Metz. 498.

"Treadwell vs. Salisbury Mfg. Co., 7 Gray 393.

"Hodges vs. New England Screw Co., 1 R. I. 347.

On page 745 it is said: " 'It is a well settled rule that " 'where the corporate seal appears affixed to a conveyance or " 'mortgage, particularly by the officer who is the legal custo- " 'dian of it, and the signatures of the proper officers approved, " 'the presumption is that such instrument was executed pur- "suant to regular and lawful authority from the corporation " 'and the burden of proving is on those who dispute the " 'existence of such authority to show the contrary. * * * " 'And it was held in Union Stock Mining Co. vs. Bank, 2 " 'Colorado, 226, that the presumption in favor of the valid- " 'ity of a deed in the name of a corporation with the corporate " 'seal and president's name signed thereto, would not be " 'overcome by showing that there was no vote of the direct- " 'ors to authorize it, on the ground that there might have " 'been given, without such vote, large powers being within " 'the exercise of the officers of the corporation by the tacit " 'assent of the board in whom the corporate authority is " 'vested.' "

EVIDENCE OF THE EXISTENCE OF PLAINTIFF CORPORATION.

People vs. Formosa, 131 N. Y. 478; 27 Am. St. Rep. 612. The case decides that: "The existence of the corporation is "established prima facie.—all evidence tending to show that "it transacted business as such, and by the fact that all the "witnesses spoke of it as a corporation."

Certificate of incorporation. Plaintiff's Exhibit "A," page 93.

Proof of acting as such, testimony of B. S. Howe, page 88.

Admission by defendant on page 88 in these words: "It "is here admitted by the defendant that the plaintiff incor- "poration has filed with the Secretary of State," etc.

EASTMAN GRANT FOR PUBLIC PURPOSE.

The grant made to the Eastmans was for a public purpose, of supplying the inhabitants and the city with water, and could not have been made for a private use, as the Common Council had no such power or authority.

Sherlock vs. Kansas City Belt R. Co., 142 Mo. 172;

64 Am. St. Rep. 551.

On page 557, the Court says: "The franchise must be "granted for public, and not for private purposes." And on page 558 the Court says: "The Municipal Council of Kan- "sas City has large powers over the streets, alleys and public "highways of said city; still, it must exercise that power in "conformity to the Constitution of the State. By the dedi- "cation of streets and alleys to public use, a trust is confided "to the city to preserve and utilize them for that purpose "only."

POLICE POWER—GOVERNMENTAL CONTROL OF PROPERTY, OF BUSINESS—WHEN PERMISSIBLE.

State vs. Associated Press, 81 Am. St. Rep. 368.

The case decided that: "It is only on the basis of the exer- "cise of the police power, and that exercise based on certain "exceptional conditions, that a person who has dedicated his

"property to a public use, or who is engaged in some *quasi* "public business, and in which some privilege or immunity "is incident to such business, can be brought under govern- "ment control in relation to such property or business and "its regulation."

After interpreting and reviewing the case of Munn vs. Ill., 94 U. S. 113, which had been relied upon, and many other cases, the Court says, on page 376, quoting from Lord Ellenborough: "There is no doubt that the general principle "is favored, both in law and in justice, that every man fix "what price he pleases upon his own property, or the use of "it; but if, for any particular purpose, the public have a right "to resort to his premises and make use of them and he have "a monopoly, he must, as an equivalent, perform the duty "attached to it, on reasonable terms. In short, it is the privi- "lege conferred, either directly or indirectly, or the dedica- "tion to the public use, which give origin to the duty toward "the public to demand only reasonable compensation for ser- "vices rendered."

On page 378, continuing, the Court says: "In this coun- "try, mills being at an early day operated by water, they "became affected by a public use, by reason of the fact that "in order to establish them, it became necessary to exercise "the power of eminent domain in flooding the lands of others, "and thus the owner of the mill, having accepted govern- "mental aid in establishing his mill, had to submit to govern- "mental control as to his charges for grinding. And when "steam mills came into use it was an easy transition for the "Legislature to regulate their tolls without inquiring the rea- "son or making any distinction between mills of the latter "and of the former kind. The same view holds as to the "right to fix the fees of hackmen, exercising, as they do, "a public employment in the public streets and engaged in an "occupation affording special opportunities for impositions "and frauds, and therefore requiring close supervision; they "are granted privileges of occupying certain public stands "denied to others, and their charges to the public are regu- "lated, which is only a condition imposed in return for privi- "leges granted,—privileges otherwise liable to abuse.

"A like rule holds as to common carrier, one who holds "himself out to the public as ready and willing to carry, for "hire, certain classes of goods. Doing this, he thereby exer- "cises, so it is said, a kind of public office, and grants the "public such an interest in his business as authorizes each "individual to demand the carriage of his goods upon tender "of a reasonable, or legally regulated compensation."

On page 380, the Court quotes from Cooley on Torts, as follows: "It is a part of every man's civil rights that he be "at liberty to refuse business relations with any person whom- "soever, whether the refusal rests upon reason or is the result "of whim, caprice, prejudice or malice."

And, continuing, the Court says: "Commenting on the "same topic, it is said by another author: 'Business rela- "'tions must be voluntary in order to be consistent with civil "'liberty. An attempt of the State to compel one man to "'enter into business relations with another can only be justi- "'fied by some public reason or necessity. In an ordinary "'private business relation, the State cannot constitutionally "'interfere, whatever reason may be assigned for one's re- "'fusal to have dealings with another. It is no concern of "'the State or of the individual what those reasons are. "' * * * So that it is only on the basis of the exercise "'of the police power, and that exercise based on certain "'exceptional conditions, that a person engaged in some *quasi* "'public business and enjoying some privilege or immunity "'incident to such business, or where he has dedicated his "'property to a public use, that he can be brought under gov- "'ernmental control in relation to such property or business "'and its regulation.'"

And on page 391 reads: "Depriving an owner of property "of one of its essential attributes is depriving him of his "property, within the constitutional provision, as the right to "use of property is all that makes it valuable. * * * "Both in the State Supreme Court, and in that of the Nation, "it was ruled that the fixing of a reasonable compensation of "the use of property was wholly a legislatve and not a judicial "question—that is, a maximum in rates beyond which the "owner could not go."

And quoting from Judge Field, page 393, the Court says: "I believe the time is not distant when the evils resulting from "this assumption of a power on the part of the government "to determine the compensation a man may receive for the "use of his property or the performance of his personal ser- "vices, will become so apparent that the Courts will hasten "to declare that government can prescribe compensation "*only when it grants a special privilege,* as in the creation of "a corporation, or when the service which is rendered is a "public service, and the property is, in fact, devoted to a "public use."

JURISDICTION WHEN CLAIM IS AN ASSIGNED ONE.

This action, sounding in tort, this Court has jurisdiction of the assigned claim—the first cause of action.

Ambler vs. Eppinger, 137 U. S. 480, 481; L. Ed. Book 34, 765.

Deshler vs. Dodge, 57 U. S. (16 How.) 622.

Bushnell vs. Kennedy, 76 U. S. (9 Wall.) 387.

In the case last cited the Court says: "It has recently been "very strongly argued that the restriction only applies to con- "tracts 'which may be properly said to have contents,' not "mere naked rights of action founded on some wrongful act, "some neglect of duty to which the law attaches damages, "on rights of action founded on contracts which contain "within themselves some promise or duty to be performed."

Com. et al. vs. Chicago B. & C. R. Co., 48 Fed. 177.

Bertha Zinc & Mineral Co. vs. Vaughn, 88 Fed. 566.

JURISDICTION—CITIZENSHIP.

"A corporation is conclusively presumed to be composed of "citizens of the State or Nation which chartered it, or from "which it derives its powers."

1st Fos. Fed. Prac. 3d Ed., p. 67.

Muller vs. Dows, 94 U. S. 444.

Law Ed. Book 24, p. 207.

WATER PRIVATE PROPERTY — MUST BE PAID FOR.

We have already seen that section 1 of article XV, Constitution of Idaho, makes the use of "*appropriated* waters," alone a "public use" and "subject to the regulation and control of "the State in the manner prescribed by law." The use of well water, developed on one's own land, even for sale, or rental, or distribution, is not made a public use by our Constitution, and not by the Constitution made subject to regulation and control by the State.

By sec. 2 of art. XV, the right to collect rates for the use of water supplied to a city, or town, is made a franchise, and must be exercised in the manner prescribed by law, and section 6 of said art. XV provides that the Legislature shall provide the manner in which reasonable maximum rates may be established, for the use of water. While these waters of plaintiff are strictly private, and the use of them, whether they are to be sold or to be rented or distributed, or not used at all, is not subject to control by the State, yet the collection of rates for the water supplied to the city is a franchise and

must be exercised by authority of law. And we admit the *rates* may be regulated by the State.

The Eastmans, and their successors in interest, by necessary implication, received from the city this franchise of the right to collect reasonable rates, or compensation, for waters supplied to the inhabitants of the city, and that was the object in view, and for which the privilege of the use of the streets in the laying of their pipes was granted, as declared by the ordinance itself, which says, "for the purpose of furnishing "the inhabitants of the city with mountain water." The Legislature of Idaho has never, since the adoption of the Constitution, enacted any law providing the manner in which reasonable maximum rates may be established to be charged for the use of water sold to cities or towns, nor was there any statute in the Territory of Idaho making any such provision, except where the city was dealing with a corporation, in which case it was provided that the rate should be established by a commission appointed, two by the water corporation and two by the city; so that, when the waters were furnished by a corporation, even then the rates were to be fixed by a mutual arrangement; but there was no statute regarding how rates should be fixed for the use of water furnished by a natural person .

As we have before attempted to show, so we now repeat, that, by neecssary implication, the acceptance of the grant, and ordinance, made to the Eastmans was on conditon, agreed to by them, that they should furnish water without distinction of person, at reasonable rates, to all who demanded it, to the extent of their means. Even if section 1 of article XV did apply to these waters, if they were appropriated waters, still the *use* only would be public, and subject to regulation.

but the *waters* would not be, nor could they be taken for public use, without compensation.

Sec. 14 of Art. I, Constitution of Idaho, provides: "Pri-"vate property may be taken for public use, but not until a "just compensation, to be ascertained in a manner prescribed "by law, shall be paid therefor."

The case of People vs. Elk River M. & L. Co., 107 Cal. 221, 48 Am. St. Rep. 125, is a case where the waters were appropriated waters of a river. On page 128, the Court says: "It is contended that the law of the case is changed "by article I, section 14 of the State Constitution, which "makes the use of water for sale, rental or distribution a "public use. Certainly it was not intended by that provision "to appropriate such water for the use of the public without "compensation. The section recognizes the use is one in be-"half of which the right of eminent domain may be invoked, "and asserts the right of the State to regulate and control "the sale, rental and distribution of the same."

People vs. Stevens, 62 Cal. 209.

McCreary vs. Beaudy, 67 Cal. 120.

We conclude that, while plaintiff's waters are not public property, yet, as the plaintiff, as the successor of the Eastmans, and owner of the water works, has accepted the properties and business, it did so under the same obligations that rested upon the Eastmans, and that, while they were operating under the franchise of supplying water to the inhabitants of the city, they and their property were, so long as they did this collecting rates therefor, carrying on a business and franchise in which the public had an interest, and which were subject to State control, so far as regulating rates to be charged and prescribing the method by which the maximum rates should

be fixed, and that while the Legislature has so far failed to prescribe such method yet, still, this collecting of rates is the exercise of a franchise, and must be done under the Constitution, and as law and custom in such cases ordain; which, we think, is that they may sell and dispose of waters to their customers upon agreed rates, which shall be uniform, without distinction of person, and which require them to furnish every person on demand, and prohibits them from extorting unreasonable rates and subject to legislative control as to rates.

Souther vs. San Diego Flume Co., 112 Fed. 228.

This case deals with appropriated waters and holds that an appropriator of water for sale, rental or distribution may make contracts with customers, for the furnishing of water, and for the compensation to be paid therefor, and that the rights of the parties are governed by the contract.

IN CONCLUSION.

The record shows the nature and the ownership of the waters in question, shows property and property right relating to the use of streets, for pipes, for furnishing water to the inhabitants of the city, in the Eastmans; shows that the immediate predecessor of plaintiff in the ownership and operation of the water works was the successor in interest therein of the Eastmans, and that, for about ten years, it had owned and operated the same, under the grant to the Eastmans; shows that all parties up to 1900 interpreted the grant as we now interpret it, and as it is admitted to have been while in the hands of the Eastmans, and would be in the hands of any

individuals, and as a like grant is treated in the hands of Mr. Sonna, plaintiff's competitor in said business; shows the former custom, prior to 1897, regarding street sprinkling, was for the owners of abutting property to, at their own expense, provide for the sprinkling of their streets, and furnish the water therefor; shows that in 1897, the Legislature of Idaho, by an amendment to the city charter, placed the power and regulation to have and control street sprinkling in the city, in the Mayor and Common Council, but provided that it should be done at the cost of the owners of lots abutting on streets sprinkled; shows that after the passage of said amendatory act, the city made three several yearly contracts, for the years 1897, 1898 and 1899, for water for street sprinkling with the water company, and that it assessed the cost of the same to such abutting owners, and under the provisions of said act collected it, and paid it over to the water company; shows that the water company, in order that it might be able thus to supply the city with such water, and do so with convenience to the city in the taking of the same, was, by said contract with the city, and by the necessities of the case, obliged to expend, and did expend, the sum of over twenty thousand dollars, which it would not otherwise have been obliged to expend; and shows that the company has not and never had any special right or exclusive privilege and never enjoyed any monopoly, or any virtual monopoly; and shows that over one-fourth of the waters so taken for street sprinkling was taken for and used upon streets of the city where the said water company does not, and did not, furnish any water to the inhabitants thereof, and where its competitor does; and it appears that after the trouble arose between the city and the water company, because the city refused to pay or to

promise to pay for water to be used for street sprinkling in the year 1900, and the company refused to furnish it otherwise, that, then the city attempted to bring the water company under the obligations of section 2711, by, unknown to the company, passing an ordinance numbered 304 (page 74), pretending to grant to the water company the franchise and privileges mentioned in sections 2710 and 2712, and in said ordinance demanding that the company (p. 75) "furnish, free "of charge, sufficient water * * * for sprinkling of the "streets in said Boise City," and that, immediately after the passage of the ordinance, the water company served notice on the city that it would not accept the ordinance, or the grant and franchise it pretended to give, and that it considered the same void and of no effect, and that it did not need such pretended grants, and that it refused to furnish the water for such street sprinkling; that, thereupon, the city took the water against the orders and protests of the water company by turning the valves belonging to the water works, and by erecting stand pipes connected with the fire hydrants, which, under contracts for furnishing water for fire purposes alone, had been connected with the main pipes of the water works, and that the city claimed the right to so do in order to obtain free water for street sprinkling purposes, and did it, by and under its power and authority as a city, and, as defendant avers in its answer, by the exercise of its "governmental authority " * * * over the streets of said city * * * and "under its police power." Defendant (p. 67) admits that it "maintained and enforced the provisions of said ordinance "number 304" by denying that it did so "wrongfully"; admits that it "compelled plaintiff to furnish water for street "sprinkling," by denying that it did this "wrongfully"; in

short, nearly every material allegation of the complaint is admitted, either by an evasive denial, or otherwise—thus, the taking of the waters in the several specified amounts, is admitted, but that it was "wrongful" is denied. The value of the several items of water taken is admitted, but defendant denies that the water company was damaged thereby. The admissions and the testimony given, effect that every material allegation of the complaint is either admitted or proven—so that the question was, and is, "Can defendant justify each "and every taking set forth in the complaint, on the ground "that the obligations of section 2711 were upon the compa-"nies, and that these obligations covered each and every such "taking?"

Defendant takes the ground, in its answer, that, prior to 1900, when said rejected ordinance, number 304, was passed, the corporate predecessor of plaintiff had no right to occupy the streets with its water pipes—no right to furnish water to the inhabitants of the city, and no right to collect rates for water furnished. We think we have shown otherwise; but suppose this was admitted, would it follow that such want of any grant, contract or franchise from the city would give the defendant our property—give it the right, by its claimed "gov-"ernmental power," to help itself to this property? On the other hand, would not such fact, itself, only show the more clearly that defendant must not take, and has no right to demand, free water for any purpose? Defendant, in its answer, in effect says: "The water company must furnish this free "water because of its corporate nature, notwithstanding it "never had right, or power, or privileges, in or from the city, "until the city, in 1900, forced it to come under said rejected "and repudiated ordinance, No. 304." That is, the water

company must do everything, because it has nothing—all duties, but no powers.

Defendant, by its answer and by its acts, has taken the position that it can not only enforce the free water demand of ordinance No. 304, by its governmental and police powers, exercised in the taking of the water of the company from its pipes against its will, but, also, that it can force the company to accept the ordinance and its pretended grants and franchises, against the will, and the declared will, of the company. We find the water company in 1900 operating under a grant and franchise, given to the Eastmans, and sold to it, and after such operation for ten years, during all of which time it was dealing with the city as such water company, and contracting with it, year after year, and contracting with it to make improvement, and to go to much extra expense for the city's accommodation, and for the accommodation of its inhabitants, and then, after all this, and more, the city takes the position that the company must either cease to operate at all, or, if it does operate, it is under the necessity of doing so under said ordinance, 304, which we declare pretends to give what the company already had, in order that the city might demand what it had not, and had no right to have—the private property of the water company. Is it possible that defendant can make such efficient use of the lesson it was taught by the Supreme Court, 39 Pac. 563, where it is told, in effect, that unless the water company corporation is operating under grant obtained by a corporation under section 2710, that there is no duty on it to furnish free water or any water? We think not. It should see in that lesson that corporate existence as a water company alone does not necessarily place plaintiff under the obligations of section 2711.

And we respectfully urge that, as the taking, and the value of the property is admitted, and the manner thereof, and, as the nature thereof is shown to be strictly private property, that we were entitled to ask the jury for damages equal to the values of the properties so taken, and on the ground that the taking was wrongful, and unauthorized by law.

Respectfully sumbitted,

SELDEN B. KINGSBURY,

Of Counsel for Plaintiff.

No. 864

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

BOISE CITY ARTESIAN HOT AND COLD WATER COMPANY, Limited, Plaintiff in Error,

vs.

BOISE CITY, IDAHO, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN J. BLAKE,
CHARLES S. KINGSLEY AND
W. E. BORAH,
Attorneys for Defendant in Error.

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Attorneys for Defendant in Error.

STATEMENT.

The complainant brings this action against the defendant for the value of water which it alleges was taken from the pipes of the complainant company and used by the defendant. The complaint discloses that the complainant is a corporation organized and existing under and by virtue of the laws of the State of West Virginia. That it is the alleged successor in interest of the Artesian Hot and Cold Water Company, which was organized under the laws of the State of Idaho and which undertook to transfer its property rights and franchises to the complainant. It is

further set forth that the complainant is the owner of the water in question which was taken, that it had certain value, and asks for damages. The answer puts in issue all the material allegations of the complaint. The main question presented by the action is whether or not the appellant is obliged, under the laws of the State of Idaho, to furnish water to the respondent free for fire purposes and other great necessities, and whether or not "other great necessities" include water for street sprinkling purposes. It is contended by the respondent that, under the statutes of the State of Idaho, the complainant in error is bound to furnish water free to the city for street sprinkling purposes and that the plaintiff in error has not disclosed any facts by which it has been relieved of this obligation thus imposed by law.

ARGUMENT.

The statute to which we refer, and which has been the law of Idaho since 1887, reads as follows:

"Section 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses so long as the supply permits, at reasonable rates without distinction of person, upon their demand therefor, and must furnish water to the extent of their means in case of fire or other great necessities, free of charge. The rates to be charged for water must be determined by commissioners to be selected, as follows." (The remaining portion of the statute is immaterial to this discussion at this time.)

This statute was taken from the laws of the State of California. It had there received consideration from the Courts and had been construed in both Federal and State Courts. The clause "other great necessities" had been held

to bind the company to furnish water free for street sprinkling purposes, flushing sewers, etc. It may be safely said that the authorities below fully sustain the contention of the defendant in error, that is, that this statute as construed by the courts of California would obligate the complainant company to furnish water free for fire purposes and street sprinkling, the latter being the particular use of water involved.

Spring Valley Water Co. vs. City, 52 Cal. 111.
San Diego Water Co. vs. City, 59 Cal. 517.
Hawes vs. Company, 5 Sawyer, 281.
City vs. Spring Valley Co. 48 Cal. 493.
Hawes vs. Water Co. 104 U. S. 827.
City of Boise vs. Artesian Hot & Cold Water Co. 39 Pac. 562.
Spring Valley Water Co. vs. San Francisco, 61 Cal. 3, 18.

This construction of this statute had been placed upon the same prior to its adoption by the Legislature of the State of Idaho. We are therefore in a position to invoke the well established rule: When a Legislature enacts a statute which is a transcript of a statute of another State that has received a known judicial construction by the courts of that State, it is deemed the Legislature adopted that construction as an integral part of its act.

Coulan vs. Douall, 133 U. S. 216.
Metropolitan Ry. Co. vs. Moore, 121 U. S. 572.
Willis vs. Eastern Trust Co. 169 U. S. 295.
Henrietta M. Z. M. Co. vs. Gardener, 173 U. S. 123.

Federal courts will follow decisions of highest State courts construing statutes and Constitution of the State.

Sioux Ry. Co. vs. Trust Co. 173 U. S. 99.
Andrews vs. National F. & P. Works, 76 Fed. 166.

We urge, therefore, that as the statute stands it obligates the appellant to furnish water free to the defendant for street sprinkling purposes and that the learned Court below committed no error in so holding and excluding testimony which was sought to be introduced as to the value of this water, which under the law it was to furnish without price.

But the appellant seeks to avoid the force and effect of this statute by invoking the aid of a supposed grant or franchise which it was contended upon the trial below exempted the company from this obligation or duty. The franchise, so called, is as follows:

"Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their pipes in, through and along the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times promply repair all damage done by them or their pipes, or by water escaping therefrom.

"Section 2. This ordinance shall take effect from and after its passage and approval. Approved October 3, 1889."

It is alleged that said Eastman Brothers promptly accepted this grant, or franchise as they deem it, and that they afterwards transferred their right and interest to the Artesian Hot & Cold Water Company, Limited, on the 28th day of March, 1891. This company last named, the articles of incorporation of which are in evidence, stated, among other things, in its articles of incorporation as follows:

"2. The purposes for which it is formed are: To acquire, develop and hold springs, wells and streams of both hot and cold water and conduct the waters thereof to Boise City and vicinity in Ada County, State of Idaho, for the use of said city and the inhabitants thereof; to furnish said waters for municipal, fire, sanitary, domestic, heating, mechanical and other useful and beneficial purposes and to supply the same to the inhabitants thereof to the said Boise City and vicinity for said purposes." (Transcript, page 110.)

The effect of the plaintiff's contention upon this point is that by reason of certain grants and franchises and privileges which were given to the Eastman Brothers and by reason of the transfer of those rights, whatever they were, to the predecessor company of plaintiff's and to the plaintiff, thereby enabling them to enjoy all that Eastman Brothers could have enjoyed, they are exempted from the duty or obligation generally imposed by law under the statute to furnish water free for certain purposes. It will be conceded, I presume, that ordinarily under the general law of the State organized at the time and in the manner of the Idaho company would be compelled to furnish water free for street sprinkling purposes and other municipal purposes, but this burden, they claim is taken off by reason of this grant from the city and by reason of certain vested rights having been acquired before the passing of the act of 1887, known as the "Free Water Law." Conceding for the present that whatever rights Eastman Brothers had were transferred and inured undiminished to the benefit of the Idaho company, we take up the other question: Has there been any grant or privilege given to Eastman Brothers which exonerates their successors from the duties and liabilities and obligations imposed upon all companies

formed under the laws of the State of Idaho—have such companies passed beyond State control in this respect? The effect of the claim of plaintiff, of course, is that certain immunities from legislative control and certain obligations have been granted by virtue of this ordinance, which we have quoted in full.

It will be noticed that the ordinance is wholly silent upon the subject matter with which we are dealing in this case. It does not touch the subject of rights nor the duties of the company toward the city, and certainly in no sense does it contract with Eastman Brothers that they are to be paid for water furnished to the city.

We invoke, in the first place, therefore, the rule that they can take nothing in the way of a grant or in the way of immunity by intent or implication; they must show by clear and express terms of the grant, franchise or contract that this immunity or privilege or right exists toward them and on their behalf, for all that is not expressly and especially given is presumed against the company and in favor of the city or the State. This rule of law is now elementary.

It is difficult to select from the multitude of authorities those which seem most desirable for citation, and for this reason the brief may seem unnecessarily long.

In the case below the question was whether or not the C. B. & Q. Ry. Co., by reason of the charter given them by the Legislature, was exempted from State control as to rates to be charged for the carrying of passengers, it being provided in their charter as follows: "The Board of Directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine and to levy and collect the same for the use of said com-

pany." In the general law there was a provision that such rate should not exceed three cents a mile. The Court held that the grant did not relieve the company, saying:

"Grants of immunity from legislative governmental control are never to be presumed. On the contrary the presumptions are all the other way, and unless exemption is clearly established, the Legislature is free to act on all subjects within its jurisdiction as the public interest may seem to require. * * * It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."

Ruggles vs. People, 108 U. S. 112.

Charles, R. B. vs. Warren, B. 11 Peters, 547.

In the case below the question involved was the validity of a provision, as against the grant, in the charter of a corporation to do certain things. It was said: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be conceded but what is given in unmistakable terms or by implication equally clear. The affirmative must be shown; silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Northwest Co. vs. Hyde Park, 97 U. S. 1036.

We call attention to the decision in the case below. In this case a company was organized under the laws of the State of Kentucky and it was exempted from State control as to rates up to the time it realized no more than 14 per cent upon the investment. Afterwards a new corporation was formed and the rights of the old company trans-

ferred to the new company with this clause in the grant: "Which company possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments thereto of the original company." It was held that the new company did not take the exemption of the old company which relieved it from State control for the reason that the grant did not cover immunity and exemption. In the body of the opinion it is said: "We admit there is some ground for the contention that the grant in the act of 1851, to each of the two corporations named in it, of the powers, rights and capacities granted to the corporation of 1834, the Legislature intended to exempt the new corporations as it did the original ones from all legislation that would prevent them from earning as much as 14 per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporation such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate, ordinary legislative control, it must, in the interests of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication and if a contract with a State relating to the exercises of franchises is susceptible of two meanings, the one restricting, the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the State."

Covington vs. Sanford, 164 U. S. 563.

Hoge vs. Railway Co. 99 U. S. 302.

Bank of Commerce vs. Tenn. 104 U. S. 810.

Syracuse Water Co. vs. City of Syracuse, 5 L. R. A. 546.

In the transfer from Eastman Brothers of the Boise water works the language of the transfer is "all and singular the rights, privileges and franchises granted to said parties of the first part and their successors in interest in said water works by said Boise City by ordinance No. 94, passed October 3, 1889, whereby said parties of the first part and their successors in interest in their water works for the supplying of mountain water to the *inhabitants* of Boise City, are authorized, etc." It will be noticed that neither in the original ordinance nor in the transfer from Eastman Brothers to the Idaho company is there any effort to cover the question of furnishing water to the city and no attempt to contract for prices or exempt the Eastman Brothers or their successors in interest from any control which the Legislature may see fit to make.

This rule has been invoked of course a great many times and applied to a multitude of charters and grants, and we simply give a few of the authorities and references which may be of interest in the further investigation of this subject.

Perasall vs. G. M. Ry. Co. 161 U. S. 838.
Clark & Marshall, Vol. 2, pages 983, 985.
Phoenix Insurance Co. vs. State, 161 U. S. 660.
Syracuse Water Co. vs. City, 116 N. Y. 167.
Birmingham vs. Birmingham, 58 Am. Rep. 618.
N. O. Gas. Co. vs. Louisiana, 115 U. S. 520.

We call attention to this rule as applied to grants or franchises made by cities. Of course the same rule applies with reference to grants or franchises upon the part of the city as it does when the same is granted by the Legislature, that is to say, that nothing is to be taken by impli-

cation against the public. Therefore an ordinance or a contract by the city in the nature of a grant is to be strictly construed and that which is not expressly given in plain terms is held to be against the grantees and in favor of the city.

In the case below the question arose as to the effect of an ordinance granting a street railway the right to occupy the streets of a city and whether or not the grant was exclusive, and although the ordinance provided that the street railway should occupy the streets of the city for a period of thirty years and that the city should not confer upon any other person or corporation any privilege which would impair or destroy the rights so granted, it was nevertheless held that this was not sufficient to prevent the granting of this right to other railways. In the body of the opinion it is said: "Grants or franchises by public corporations to *individuals* or *private corporations* are to be strictly construed and no exclusive privilege passes unless it be plainly conferred by express words or necessary implication. The grant made by the commonwealth or by the municipal corporation under authority from the commonwealth is to be taken most strongly against the grantee and nothing is to be taken by implication against the public except what necessarily flows from the nature of the terms of the grant."

Indianapolis C. S. Co. vs. C. S. R. Co. 8 L. R. A. 539.
Omaha vs. Cable Co. 30 Fed. 327.

The case below is not entirely dissimilar to the case at bar. In this case the city of Hamilton had granted the plaintiff company, which was organized for the purpose of supplying gas to the city, the right to use its streets and to supply gas to its inhabitants. It had also contracted for

some thirty years with the city for gas, but in 1889 the city refused to contract further. The company demanded the contract, claiming it had the right to expect the contract in view of past transactions and that to refuse to contract was contrary to the ordinance under which it went into the city and to the interpretation which had been placed upon the ordinance by a course of dealings for thirty years. It was held, however, that the city could refuse to contract at any time and that the former contract gave no rights for continuation of the same and that the company had no vested rights to supply the public or private consumers. It was further said in construing the ordinance: "Grants by the public are to be strictly construed. * * * It (the city) made contracts with the company from time to time. The last by its own limitation expired on the first of January, 1889. That the city performed all its contract obligations is not denied, and if the city did not see fit to further contract it was beyond the power of the company to compel them to do so. * * * The general law under which the Hamilton Gas Company was formed was subject to the limitations and reservations contained in this provision of the Constitution. The constitutional provision entered into the general law and operated as to the corporations organized under it in the same manner as a reservation embodied in a special charter."

State vs. City of Hamilton, 23 N. E. 935.

Turnpike Co. vs. City, 3 Wallace, 210.

In the case below the City of Philadelphia granted to the City Railway Company the right to use its streets and provided in the grant that the company should not be charged any more than other charter railway companies as a license, which was $30. A law was afterwards passed

raising this to $50, and it was held that this did not impair the obligation of this contract. That the effect of the contract under the doctrine of strict construction was not that there should never be a change in the amount but at that specific time that that was the reasonable charge to be made.

Union Railway Co. vs. Philadelphia, 110 U. S. 912.
City of St. Louis vs. M. R. Co. 13 Mo. Ap. 524.
Rushville vs. Rushville Co. 15 L. R. A. 321.

Viewing the ordinance of October 3, 1889, in the light of these decisions it seems clear that it can avail the plaintiffs nothing in this action and that the Court below was entirely correct in holding that it in no wise inhibited the Legislature from imposing this obligation upon the plaintiff or its predecessor. This ordinance is wholly silent upon the subject of rights, charges, duties and obligations. It simply gives them a right to go into the city. All other matters are open to future contract or future legislation. The ordinance does not in any way inhibit or contract against future legislation, and whether this franchise, so-called, was in the hands of the Eastman Brothers or their successors, the corporation, the property being dedicated to a public use was subject to such obligations, charges and duties as the State might reasonably impose. And the duty here imposed is one which the Courts have held proper and reasonable. There being nothing in the nature of a contract in this ordinance against free water when Eastman Brothers transferred to the Idaho company, it took the rights subject to all obligations then imposed by statute. The Idaho company organized under the laws of the State and in doing so assumed by virtue of such organization the duties and obligations imposed upon it by the laws of

the State. In other words, the laws of the State under which it was organized became a part of its charter and constituted a part of its contract and obligation with the State. When the company saw fit to accept of its charter for the purpose of furnishing water to the inhabitants of Boise City it at the same time under the law agreed to supply water for certain purposes free of charge. As said in the case of San Diego Water Co. vs. City, *supra*: "As a corporation formed for the purpose of supplying the inhabitants of the city with pure, fresh water the plaintiff is a creature of the laws under which it incorporated, and derives its rights, duties and obligations entirely from them. When it incorporated under those laws it assumed two obligations: First, to furnish water to the extent of its means in case of fire or other great necessities free of charge. Second, to furnish water to the inhabitants of the city for family use upon proper demand at reasonable rates," etc. It was also said by Judge Ross, in the case of Spring Valley Water Company vs. San Francisco: "By incorporating and availing itself of the privileges of this act the company became bound, among other things, to furnish water to the extent of its means to the city in case of fire or other great necessities free of charge."

So we say, by incorporating under the laws of the State of Idaho, by taking advantage of this act to become a corporate body for the purpose of furnishing water to the inhabitants of Boise City, it necessarily and conclusively assumed and contracted to furnish water free to the city for fire and other great necessities. Now, when it took an assignment from Eastman Brothers, what did it get? It certainly did not get a contract which relieved it from this duty or which prohibited the Legislature from imposing it. because the grant is wholly silent upon the subject and does

not purport to cover it in any way, shape or form.

It was said in the argument below that Eastman Brothers, as they exercised this right, did not have to furnish water free because Section 2711 only applies to corporations. Granted for the sake of the argument. Yet they did not have to do so simply because the Legislature did not see fit to extend this obligation or duty to individuals. But there was no reason why the Legislature should not have done so if it had desired to. There was nothing in the ordinance or elsewhere to prevent the Legislature from so doing. Had the Legislature seen fit to exercise its power and incorporate in Section 2711 "individuals," then Eastman Brothers would have been compelled to comply, for there was nothing in their ordinance to relieve them from future legislation. They had seen fit to engage in a business by which they dedicated their property to a public use and it was subject to such duties as the State might see fit to impose. And when they saw fit to organize this into a corporation they then and there, under the laws of the State, elected to take upon them this obligation. It was the law of the land, which of course they were conclusively presumed to know. They elected to go into business under it and when they did so they placed themselves in a position where they could no longer complain of its duties and obligations. If they did not want to comply with this duty they could have exercised their right as individuals until such time as the Legislature should extend this obligation to individuals. As to the rule that where a corporation is organized under the laws of the State the general laws of the State become a part and parcel of the charter and constitute the duties and obligations of the corporation, we cite below some authorities.

What we say is that when a water company, for instance,

is organized for the purpose of supplying the city with water under the general laws of the State with reference to such matters, such corporation organized with the understanding and agreement and obligation with the State that it will do and perform all things required by the general laws of the State.

In the case below the question involved was whether or not an act of the Legislature empowering the State to fix rates was valid as against rates fixed by the city prior to the passage of the act, and it was held that the act was constitutional. In the body of the opinion it is said: "The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which organization took place. The provisions of the law enter into and form a part of the charter."

City of Danville vs. Danville Water Co. 53 N. E. 118

People vs. C. G. T. Co. 23 N. E. 798.

Water Co. vs. Fergus, 53 N. E. 363.

City of Danville vs. Danville Co. 180 U. S. 697.

Spring Valley Water Works vs. Schottler, 110 U. S. 173.

Morawetz on Corporations, Vol 1, Sec. 318.

This rule is well illustrated in the case below. There was a general provision of the laws of Massachusetts providing for the incorporation of and defining the powers of manufacturing corporations as affecting particular beer companies. In this general law was a provision that the Legislature should from time to time have the right to provide for the regulation and management of the business of such corporations. The complainant company was incorporated for the purpose of manufacturing malt liquors, and

after its incorporation what is known as the prohibitory liquor law was passed and it was contended that in view of the fact that the State had given it a charter authorizing it to manufacture and sell liquor that it could not afterwards impair the contract by refusing this right, but it was held by the Supreme Court that the general act of the State became a part and parcel of the contract and the State had a right under that portion of the contract to prohibit the sale of liquors. Speaking of this general provision of the law, the Supreme Court said: "This reservation of the power was a part of the contract. * * The charter of the company adopted the provisions of the act of 1809 as a portion of its charter and these provisions remain a part of the charter notwithstanding the subsequent repeal of the act."

Boston Beer Co. vs. Mass. 97 U. S. 989.

"Wherever privileges are bestowed by statute upon a corporation the State may prescribe a return of some equivalent to the public as a condition precedent to the enjoyment of the privilege; and the acceptance of the benefits of the statute make it obligatory upon the corporation to perform its duties to the public. These principles were applied to a water company who was charged as a condition of its acceptance and enjoyment of the privilege granted to it by statute with the duty of furnishing free of charge all the water that may be needed by the city for fire purposes and other public necessities."

Tiedman on Police Powers & Trust, Vol. 2, page 973.
C. B. & Q. Ry. Co. vs. Iowa, 64 U. S. 95.
Central Trust Co. vs. Street Ry. Co. 82 Fed. 6.

By an examination of the charter of the company involved in this suit it will be seen that they specified in

their charter that they were organized for the purpose of supplying water to the inhabitants of Boise City. When they did so, under all the authorities it became part of their contractual relationship with the State to supply water free to the city for certain purposes. When it entered into this new relationship with the State it entered into a contract which was a part and parcel of the agreement which brought the corporation into existence and this contract is to be construed in favor of the State.

"A contract concerning governmental functions such as one which affects the right of a city to regulate rates of water companies must be strictly construed; and such functions can not be held to have been stipulated away by doubtful or ambiguous provisions."

Rogers Water Co. vs. Ferguson, 180 U. S. 702.

Counsel have set forth at length in their pleadings and have contended that by reason of certain contracts entered into upon the part of the city with reference to water that certain rights apparently have arisen and that they are entitled to have these rights continued by contracts. So far as any contracts as set forth are concerned they can have no bearing upon the question of whether or not at this time the company is obligated to furnish water free. In the first place, any contract made upon the part of the city was contrary to law and wholly void and no rights could arise nor nothing in the way of an estoppel by reason of such contracts. That the contracts were void see the case below.

San Diego Co. vs. City of San Diego, 59 Cal. 520.

The plaintiff is not a private corporation but a quasi-public corporation. It is in every sense subject to the control of the State and is imposed with a public duty.

"Its property and its effects are devoted to a public use in which the public is interested."

City of Danville vs. Danville Water Co. 54 N. E. 224.
City of Danville vs. Danville Water Co. 53 N. E. 118.
Munn vs. ....., 94 U. S. 77.

"No estoppel can ordinarily arise from the act of a municipal corporation or its officers done in violation of or without authority of the law. Every person is presumed to know the nature and extent of the powers of municipal officers and therefore can not be deemed to have been deceived or misled by acts done without legal authority."

City of Danville vs. Danville Water Co. 53 N. E. 123.
Am. and Eng. Ency. of Law, Vol. 29, page 13.
Dillon on Municipal Corporations, Section 91.
Syracuse Water Co. vs. City, 5 L. R. A. 546.

It is also contended and alleged in the complaint that by reason of this water having been appropriated or obtained from private lands and not from public streams that a different rule would apply with reference to the control of the same by the State or city. The State, however, makes all water which is sold, rented or distributed for a public use subject to its control and the same does not depend upon the source from which it is appropriated. Our Constitution in this connection provides: "The use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use but which after such appropriation has heretofore been or may hereafter be sold, rented or distributed is hereby declared to be a public use and subject to the regulation and control of the State in the manner prescribed by law."

Art. XV, Sec. 1 (our Constitution was adopted August 6, 1889, and ratified the first of November, 1889).

In the case below it is said: "When water is designed, set apart and devoted to purposes of sale, rental or distribution it is appropriated to those uses or some of them and becomes subject to the public use declared by the Constitution without reference to the mode of acquisition."

Merril vs. Irrigation Co. 44 Pac. 720.
McCreary vs. Beaudry, 7 Pac. 264.
Price vs. Banking Co. 56 Cal. 431.
Fresno vs. Canal Co. 32 Pac. 943.
People vs. Stevens, 62 Cal. 209.

It was insisted in the Court below, and we presume it will be here, that this provision of the statute with reference to free water had been repealed by virtue of an act empowering the Board of County Commissioners to establish a maximum rate for the use of water, passed and approved February 25, 1899.

Session Laws of Idaho, 1899, pages 380, 384.

Section 26 of this act, which is the section relied upon, reads as follows: "That the County Commissioners of each county now organized, and of each county to be hereafter organized in this State shall, at their regular session in January of each year and at such other sessions as they in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming water for irrigation or other beneficial purpose or

purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such Board of County Commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: *Provided,* That when any ditch, canal or conduit shall extend into two or more counties, the County Commissioners of each of such counties shall fix the maximum rate for water used in that county."

It will be seen from a most casual reading of this section that it has no reference to the subject matter here. It does not purport to provide a means by which rates are fixed for any city or muncipal corporation but simply part of the machinery for fixing rates for canals or ditches for irrigation or other beneficial purposes. At least it does not purport to legislate upon the subject of free water for fire purposes and other great necessities in any city or town. There could be no repeal here unless it would be by implication, as it is not contended that there is an express provision repealing this statute in question. An examination of this act which they claim repeals this free water law shows it is dealing with a subject matter wholly disconnected with the furnishing of water to a city. It is dealing with the subject matter of supplying water from irrigation canals to the users under such canals for agricultural purposes principally. This is particularly disclosed by examining Sections 28, 29 and 30 of said act, as there it is disclosed what is to be taken into consideration, how the rates are to be fixed and the basis for fixing the same, which accentuates the contention that it relates alone in its intent and purpose to irrigating canals. Certainly both these

statutes can stand, that is to say they are not irreconcilable as they have not covered the same subject matter. This being true there can be no repeal.

Repeal by implication is never presumed.

Harford vs. United States, 8 Cranch, 109.

"It must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly as the case may be."

State vs. Stoll, 17 Wallace, 430.

Board of Supervisors vs. Lackawana I. & C. Co. 93 U. S. 619.

Ex parte Crowdog, 109 U. S. 570.

Arthur vs. Homer, 96 U. S. 140.

In the case below Justice Story said: "That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether or not it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to say that subsequent laws cover some or even all of the cases provided for by it, for they may be simply affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old is repealed by implication only, *pro tanto* to the extent of the repugnancy."

Wood vs. United State, 16 Peters, 362.

Chew Heong vs. United States, 112 U. S. 536.

Counsel also rely upon Subdivision 30 of Section 37 of

the new charter of Boise City, adopted March 14, 1901, as an evidence of the intent of the law makers to do away with free water for the city. This section reads as follows: "To provide for the sprinkling, cleaning, repairing of all the streets in said city and to provide for the payment of the expense thereof. To levy a tax or special assessment upon the real property which shall be a lien upon said property until paid."

This provision has never been construed by the city or by any one connected with its enforcement to provide for other than the expense of putting the water upon the streets. No one has been charged for the value of the water and no one under the present law of the State could be. This is simply a means by which the property holders can be made to pay the cost of actual sprinkling, for teams and sprinkling apparatus, etc. To this extent it has been applied and no further. Counsel seem to labor under the impression that there is no other expense connected with the sprinkling of the streets other than the value of the water, or that the water would flow upon the streets and do its service without any expense. The expense provided for here is one which the city would otherwise have to pay and this is simply a means of making the property holders liable for it which they were not under the old charter.

It seems from the argument upon the trial of this cause that the cases upon which counsel relied in the bringing of this action are the following:

Los Angeles Water Co. vs. City of Los Angeles, 88 Fed. 720.

Santa Anna Water Co. vs. San Buena Ventura, 56 Fed. 339.

In the cases above cited there was an express contract in

writing entered into for a valuable consideration whereby the fixing of rates were agreed upon and it was expressly provided therein that in consideration of the parties doing certain things, releasing certain claims and putting in certain improvements, that the rates would not be reduced below a certain minimum stated. The provision of the contract which the honorable court construes is as follows: "Always provided that the mayor and common council of said city shall have and do reserve the right to regulate the water rates charged by said parties of the second part or their assigns, provided that they shall not so reduce such rates or so fix the price thereof to be less than those now charged by the parties of the second part." The case was devoted almost entirely to two questions. First, whether or not the city had the power to make the contract; and second, if so, whether or not the contract was void by reason of the fact that it was in the nature of a monopoly extending over thirty years. The fact that such a contract was made and that it was clear, certain and explicit was not doubted, while in the case at bar we contend there was no contract, no stipulation or agreement in question which covers the subject matter of the litigation.

In the other case the instance is one in which the city had no water works and entered into a full and complete contract to provide for the building of the same. In this contract it is expressly stipulated as to all matters touching the rates, etc., for a period of fifty years. The contract was assigned and after it was assigned the city expressly accepted the assignment and expressly granted to the assignees by ordinance the same rights which have been given to the assignors. This case throws but little light upon the case at bar, where the ordinance is silent upon this subject and silence is the same as a stipulation against them.

We may call attention here to the fact also in view of the language used in the Los Angeles case that there could be no more complete monopoly than would arise in favor of the water company here should the contention of the water company prevail. If the company is correct, then they are permitted to charge for water furnished the city by reason of this ordinance of 1889, while each and every other company must necessarily comply with the law of the State and take upon itself the burden of furnishing water free. This would be such a complete advantage that the other companies could not in any sense compete with the old company and according to the ordinance there is no limit in time to this right. The logic of their contention is that they have a right in perpetuity to use the streets and alleys of Boise City, to enjoy the franchise to sell water to the inhabitants and collect toll and rates and are absolutely free from this obligation of furnishing water free for fire purposes and other great necessities, which burden must rest upon all competitors. It would require very clear and explicit language in an ordinance, a grant, or a contract to persuade a court, it seems to us, to hold in favor of such contention.

The plaintiff in this case is the successor of the Idaho company and undoubtedly was made the successor for the purpose of bringing this suit and for the purpose of giving the Federal couht jurisdiction.

Lehigh Co. vs. Kelley, 160 U. S. 320.

Lake County vs. Dudley, 173 U. S. 684.

But be that as it may, the plaintff company, of course, had no greater rights than had the Idaho company, and so far as the obligation imposed by the statutes of Idaho is concerned it stands in the same attitude as the old company. Article 2, Section 10 of our Constitution provides:

"No company or corporation formed under the laws of any other State or Territory shall have or be allowed to exercise or enjoy within this State any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this State." A similar section of the Constitution of California has been construed by the Federal court and it was held that a foreign corporation seeking to avail itself of the fruits of the water laws must take on the burden which the law imposes also. In the case at bar these people went into a foreign State, as we contend, for the sole purpose of relieving themselves from a burden which would exist in case they remained a domestic corporation. But they cannot go into a city and State and avail themselves of the right to furnish water to the inhabitants of the city without at the same time taking on themselves the duty which the State imposes upon all who undertake to carry on this business.

San Diego Town Co. vs. National City, 74 Fed. 80.
Lanning vs. Osborne, 76 Fed. 319.
San Diego vs. National City, 174 U. S. 740.

We direct the Court's attention also to the fact that the ordinance upon which so much stress is laid as to the special right or privilege of this company was approved October 3, 1889. That the Constitution of the State of Idaho was adopted August 6, 1889, and finally ratified the first Tuesday of November, 1899, and in this Constituaion was this provision: "Article 2, Section 1. All existing charters or grants of special or exclusive privileges under which corporators or grantees shall not have organized or commenced business in good faith at the time of the adoption of this Constitution shall thereafter have no validity."

The burden was upon the complainant to show that they had earned this franchise as all presumptions are against them. The complaint shows that the Idaho company was organized March 27, 1891. (Transcript, page 110.)

Until work is done under a grant or charter and some expenditures made the charter or grant may be taken away or repealed. Mere acceptance is not enough.

Brannon on 14th Amendment, page 365.
Walla Walla vs. Company, 172 U. S. 172.
Hamilton vs. City, 146 U. S. 963.
Pikes Peak vs. Col. 105 Fed. 1.

We contend that the Idaho company, being a mere creature of the law, had no authority, without the consent of the city, to transfer its franchise and thus authorize a stranger to the city to come into the city and exercise this franchise; that the plaintiff company has not either plead or proven sufficient facts to enable it to exercise this franchise. This point is particularly pertinent to the equity case.

This brief is already being extended to such length that we will not enter into an argument upon this matter, but will content ourselves with citing Constitution and the authorities which we believe to sustain our contention.

We have already quoted Section 1, Article 15, and we now quote Section 2 of the State Constitution: "The right to collect rates or compensation for the use of water supplied to any county, city or town or water district or the inhabitants thereof is a franchise and cannot be exercised except by authority of and in the manner prescribed by law." Under Sections 1 and 2, Article 15 of the Constitution all water, however appropriated, is subject to public control and the right to sell and distribute the same is a franchise. We claim that the present corporation wholly fails to dis

close any authority under the law to collect rates or to do business in Boise City and that its pretended purchase of the Idaho company's franchise was void.

Brunswick vs. Gas. Co. 35 Am. St. 385.
Visilia vs. Simms, 37 Pac. 1042.
Thomas vs. Railway Co. 101 U. S. 952.
Pullman Co. vs. Transportation Co. 139 U. S. 1.
Penn Ry Co. vs. St. Louis Ry Co. 118 U. S. 84.
Gibbs vs. Gas Co. 130 U. S. 979.
O. R. & N. Co. vs. O. R. Co. 130 U. S. 837.

We have been discussing this case so far as if the plaintiffs had proven the material allegations of their complaint, but as a matter of fact at the time that the learned judge below ruled against them upon the introduction of evidence, at the time they rested and the Court instructed the jury on matters of which they now complain, there was practically no evidence before the Court upon any of the main questions upon which they now rely for reversal. That is to say, they had not proven the allegations of their complaint at all. At the time that the Court ruled against the plaintiff as to the value of this water and instructed the jury there was before the Court the articles of incorporation of the plaintiff and of the Idaho company, the deed purporting to convey the property and franchise from the old company to the new, the fact that the city had taken the water and not paid for it, the fact that the waters were developed from artesian wells, the supply of the company and the additional expense necessary by reason of the street sprinkling and the cost of the water company's system, and this practically constituted their proof. They did not see fit to proceed and prove the material allegations of their com-

plaint, all of which we denied, neither did they see fit to offer to prove any of these allegations. It will be noticed by referring to the answer that the answer denies the amount in controversy; denies allegations in paragraphs 4 and 5, except as to the ordinance; puts in issue the allegation of the complaint; that the Boise Water Works Company assumed no other duties or liabilities than that which belonged to the Eastman Brothers, or that said company was ever treated as the successors of the Eastman Brothers; denies that they were ever dealt or treated with or considered as their successors; denies the allegation with reference to Peter Sonna enjoying a similar franchise, and in fact puts in issue every material allegations of the complaint. We submit, therefore, that whatever view might be taken of this case if they had proven all the material allegations of the complaint, which evidently they could not do or they would have done so, as the record now stands there is nothing in the proof to relieve them from the obligation of furnishing water free.

Upon page 36 of the counsel's brief they say: "Had the Eastman Brothers continued to hold the water works property and the rights, privileges and benefits ordained to them, etc., and to operate the water works continuously from the time such ordinance was passed to the present time, etc., there is no question but they would stand as does Mr. Sonna, independent of any obligation to furnish free water."

In the first place, there is no proof here as to how Mr. Sonna stands; and in the second place, we will admit for the sake of argument that had Eastman Brothers continued to own this property they would not have had to furnish water free, but this was not by reason of any virtue in the ordinance of October 3, 1889; it was not by reason of

this ordinance that Eastman Brothers would be relieved, as that ordinance does not touch that subject. It would be simply because the Legislature had not seen fit to impose that obligation upon individuals. But the Legislature could have done so at any time it desired to do so. The moment the Eastman Brothers came into the city, dedicated their property to a public use, they subjected it thereby to public control and all reasonable regulations and obligations which the Legislature might see fit to impose. Therefore had Eastman Brothers continued to hold this property the Legislature could have imposed this obligation upon them had it simply amended the law and included them.

Upon page 37 of the brief, quoting from the opinion, it seems, of other attorneys, the counsel say: "The Eastmans necessarily took this franchise when they accepted it with the implied obligations and terms that they would furnish mountain water to the extent of their means *to the city* and its inhabitants, at reasonable rates and without discrimination and they received it with the correlative implied right to charge and collect reasonable and uniform rates for water furnished the city and its inhabitants." The vice of this reasoning consists in the ignoring of the well established rule with reference to the interpretation of grants or franchises which we have already referred to in a former part of the brief. The reasoning here is the same argument used by Justice Story in his dissenting opinion in the famous Charles River bridge case, but never accepted by the Courts. We ask where they get their implied rights when you come to interpret an ordinance, a grant, or a franchise which has been passed or given by a city to an individual or a corporation? It is certainly not a necessary implication that an ordinance which gives a right to collect rates from the inhabitants also gives a right

to collect rates from a city when the ordinance itself confines its language entirely to the inhabitants. It was said in the 30th Feberal, 327, heretofore cited: "Nothing passes unless it is obvious that the intent was that it should pass. He who says that the city has given him a franchise will be compelled to show that the right claimed is within the terms of the grant. * * * Any ambiguity in the terms of the grant must operate against the corporation." Now in referring to this ordinance we find that the subject matter of furnishing water to the city is not mentioned, much less the question of rates, or how it should be furnished. This being true under the well established rule, the construction must be in favor of the public. For this company can claim nothing, nor could the Eastman Brothers, which "is not clearly given by the law." Certainly there is no contract or stipulation in the ordinance prohibiting the Legislature from imposing either upon Eastman Brothers or their successors the burden of furnishing free water.

The ordinance of October 3, 1889, instead of reading as one would infer from the language of Messrs. Dickson and Ellis, says: "Of supplying mountain water to the *residents of Boise City* are hereby authorized," etc. The ordinance is very careful to confine the authority to supply water to the residents. Under what rule of interpretation of ordinances and grants can they read into this ordinance the supplying of water to the city when the ordinance itself confines the authority solely to the inhabitants? The distinction as to supplying water to the inhabitants and to the city is one which is made by statute and one which existed under the laws of the State of Idaho at the time this ordinance was given. It is peculiarly strange that if Eastman Brothers or anybody else supposed this related to the city also that they did not make some proof or offer

of proof of this in the Court below, that they did not show that Eastman Brothers themselves received some pay from the city, that they did not show what the relationship of Eastman Brothers was to the city while they exercised this right. That might have thrown some light on the subject.

This ordinance, however, is not ambiguous, which of itself would resolve the matter in favor of the public, but it is plain and specific, simply referring alone to the matter of supplying water to the inhabitants, saying nothing about the city, and even as to this it purports to say nothing more than to give them the right to come into the city. In the matter of fixing rates and in all matters with reference to machinery for supplying the inhabitants it is left open entirely to future legislation. We plead in our answer and stood ready to prove that the company is now collecting rates which were fixed under the provisions of the statute which they say this ordinance rendered nugatory as to this company. The company has never purported to act under any other theory.

Upon page 4 of counsel's brief they say: "That said statute is repealed by the Constitution of Idaho and by the acts of the Legislature thereunder." The Supreme Court of the State of Idaho has held this act constitutional. It being a question of the effect of the adoption of the State Constitution upon the statute, and the Court having held that the law is constitutional, we assume that it will be accepted by the Federal Court.

Boise City vs. A. H. C. Co. 39 Pac. 562.

Upon the same page they also say: "That neither the plaintiff nor its predecessor received from the State or the city any franchise," etc. The Idaho company took its franchise to do business from the State of Idaho. It was

incorporated for a specified purpose stated in its articles of incorporation. When it took this franchise to do business it informed the State that that business was to furnish water to the inhabitants to Boise City and to the city. (Transcript, page 110.) When it did so it necessarily agreed with the State that after organizing for this purpose, in consideration of the privilege given to it by the State, that it would furnish water to the city free of charge for fire and other great necessities. As we have before stated, it was a part and parcel of the contract with the city. Upon page 5 it is stated that they "are operating and always did operate under and by virtue of a grant made not to any corporation but to two individuals." We call attention to the fact that this is specifically denied in the answer and there is no proof whatever on the subject. We stand ready under the allegations of the answer to prove that this so-called franchise or ordinance of October 3, 1889, had never been recognized or accepted or plead in any of the litigation heretofore had with reference to this matter; at any rate, there is no proof upon this subject whatever.

They also contend that the nature of the water annuls the statute, that because this water was hot water the statute does not apply. This argument will be found upon page 5 of the brief. We have been unable to find any distinction made by the statute as to hot and cold water. Upon page 9 of the brief it is stated that Eastman Brothers accepted such grant or franchise and continued to lay water pipes in the streets, etc. We, also, in this connection call attention to the statement of facts, or what purports to be the facts, upon pages 10, 11, 12, 13 and also 33, 34. Counsel quote the allegations of their complaint as if proof had been introduced upon these matters. These allegations were each and all denied, and, as we have stated before,

there was no proof introduced or offered to prove these allegations which are referred to upon these pages. We do not think that had the proof been introduced it would have changed the law of the case; nevertheless, it is hardly proper to argue from these facts as a basis when they were not proven in the case and when the error complained of is that of having instructed the jury to return a verdict for the defendant.

Upon page 30 it is said that the whole contention grows out of the fact that the defendant city has since March, 1900, claimed to be entitled to free water, etc. This statement has so often been repeated that it is worth while to state that it is entirely gratuitous upon the part of counsel. This contention as to free water has not arisen since 1900. It has been the subject of contention ever since the company has been in existence, some years the council making a contract when they were favorable to the company and some years not. The case which we cited from 39 Pacific, arose out of the same contention which gives rise to this case, and while, as we have already stated, there could be no such thing as an estoppel by reason of void contracts, yet it is but fair to say that the contention that this litigation is a new thing is incorrect as the reported cases show. Upon page 32 of the brief counsel indulge in some distinction a little difficult to grasp, wherein it is sought to show that the Idaho company being formed under the general law took none of the obligations of Section 2711. Of course the corporation was formed under the general law with reference to the formation of corporations. It could have been formed in no other way, but the specific purpose for which it was formed is stated in its articles of incorporation and this, under the statute, gives rise to the obligation, for the statute says "all corporations formed to supply

water." It does not say, as counsel would have it appear, that all corporations which have secured a franchise from the city must do so and so, but its contract is with the State and therefore when it is *formed* for the specific purpose of supplying water to a city or town it contracts to discharge the obligation imposed upon it by Section 2711. Following this line of argument they say upon page 42: "Such corporation is only subject to the burden of furnishing free water imposed by Section 2711 when it has secured the rights, franchise and privileges from the State or city." This is in a sense correct and it did secure the right and privilege from the State when it incorporated for the purpose of supplying water to the inhabitants of any city or town, and when the State gave it this privilege or franchise it exacted an agreement which by incorporating was accepted and constituted the contract between the State and the corporation. Now, after it had entered into this contract with the State, it is true it purchased the Eastman Bros.' franchise so-called. But when it did so it did not purchase anything which relieved it from this obligation which it had already assumed because the Eastman Brothers' grant was silent upon the subject matter with which it was contracting with the State, that is, to furnish free water. Had the Eastman Brothers' contract provided in the language of the 56 Federal, 399, relied upon by counsel, specifically that they should furnish water to the city and should fix their own rates or such rates as might not fall below a certain figure, they would undoubtedly be in a different position, but they must be able to place their finger upon the contract which relieves them from this obligation. "Silence is negation."

In conclusion, we say—

First, That under the statutes of the State of Idaho, the

Idaho company and its successors were obligated to furnish water free to the city for fire purposes and other great necessities, which include sprinkling the streets.

Second, That the ordinance of October 3, 1889, in no wise referred to the matter of furnishing water to the city, nor did it contain any contract of any kind against the right or power of the Legislature to impose upon the Eastman Brothers or their successors the obligation of furnishing free water—that said ordinance was wholly silent upon the subject of the duty of Eastman Brothers or their successors to the city and that therefore when they incorporated and took upon themselves a corporate existence they assumed the obligations and duties imposed upon such corporations by law.

Third, That Section 2711 being a part of the general laws of the State became a part of the contractural relation between the corporation when it was formed for this purpose and the State and that inasmuch as there is nothing in the ordinance of October 3, 1889, to relieve them from that obligation they are bound by the general laws of the State.

Fourth, That the plaintiff wholly failed to make any proof of the allegations of the complaint upon which they chiefly rely in their argument in support of the contention that they were relieved from this duty imposed by Section 2711.

Fifth, That the complainant company has not proven any right or franchise to do business in Boise City or to collect rates from either the inhabitants or the city and wholly fails to disclose any authority upon the part of the Idaho company to sell its franchise or authorize its successor to enter into the city and exercise and enjoy this franchise.

Sixth. That the contracts which were made between the water company and the city referred to in the complaint, were void under the laws of the State of Idaho and could not in any way estop the city from repudiating them at any time it chose to do so, as the water company was bound to know the extent to which the city could go in making such contracts.

Seventh. That Section 2711 has been held to be constitutional by the Supreme Court of the State of Idaho and that no repeal of said Section has been had either directly or by implication.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

BOISE ARTESIAN HOT & COLD WATER CO., Limited,
Plaintiff in Error,
vs.
BOISE CITY, IDAHO,
Defendant in Error.

Brief for Plaintiff in Error.

Upon Appeal from the United States Circuit Court for District of Idaho, Central Division.

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Counsel do not deem it necessary to call the Court's attention at any length to the points already discussed and presented in the main brief filed in this action. The court will notice, upon an examination of the Bill of Complaint and the answer thereto, that the material allegations of the complaint have been admitted by the answer; one or two of the facts stated therein which were denied were proven upon the trial, and the trial court in giving the peremtory instruction to the jury to find for the defendant, held in effect that the bill

of complaint therein, as a matter of law, did not state facts sufficient to constitute a cause o action against the Defendant. This ruling of the Trial Court in particular, counsel claim to have been erroneous for the following reasons:

First. In addition to the reasons and authorities cited in the main brief to the effect that the Plaintiff Company herein had the right to buy the franchise and property of its predecessor in interest therein, and transact its business under the same rights and obligations as rested upon the Eastman Bros., the original guarantees of said franchises, we call the court's attention to the fact that, in this State the Law recognizes that a franchise is private property, and also that property charged with a public use is also a private property. This being true, the Plaintiff Company and its predecessors in interest, had a right to transfer such property as the property of individuals is transferred;

Under the title of Eminent Domain defining what property may be was taken.

Sec. 5212 R. S. of Idaho, 1887, is as follows:

Sec. 5212. "The private property which may be taken under this title encludes * * * * * * * * * * * * * * * * *

3. Property appropriated to public use.

4. Franchises for Toll Roads, Toll Bridges, and Ferrys and all other franchises. There are only two kinds o corporations known to the Laws of Idaho.

Sec. 2575, R. S. Idaho, 1887, "Corporations are either pubic or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private."

The laws of Idaho Sec. 2642 R. S. 1887 provide, that the

franchises and all the rights and privileges thereof of corporations may be levied upon and sold, execution in the same manner and with like effect as any other property.

The power of the Plaintiff corporation to purchase the property and franchises of its predecessors in interest is conferred by Sec. 2633, R. S. Idaho, 1887, which provides as follows:

"Every corporation as such, has power * ** * * * * *

4th, to purchase, hold and convey such real and personal estate as the purposes of the corporation may require not exceeding the amount limited by this title. * * * * * * * * *

8th. "To enter into any contracts or obligations essential, necessary or proper to the transaction of its ordinary powers or for the purposes of the corporation."

The above Statute is identical with the Statutes of California upon this subject, and in the case of San Luis Water Co. vs. Estrada, 117 Cal. 168, the Court held that under said Statute, a corporation had power to purchase property and franchises for the purposes of the corporation.

The Constitution of the State of Washington, Article 12, Sec. 8, providing, that if a corporation alienate its franchises, neither the franchise nor property held thereunder shall be relieved from liabilities incurred in the use of such franchis. This provision of the constitution is practically the same as the provisions of the Idaho constitution, Article 11, Sec. 15, "The Legislature shall not pass any law permitting the leasing or alienation of any franchise as to release or releive the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

And the Supreme Court of the State of Washington, in the case of Klostermon vs. Mason Co. R. Co. 36 Pac. 136, in the opinion of the court, in reference to the above provision of the Constitution say, "And the Constitution would seem to imply a right even to dispose of its franchise, but not in such a manner as to relieve the franchise or property held under it from certain liabilities of the grantor.

In addition to the Statutes heretofore cited granting power to a corporation to sell and dispose of its property, counsel ocntends that the Statutes of this State confer such power in direct terms upon the corporations. Under the title of general provisions applicable to all the Codes, Sec. 16, R. S. Idaho, 1887, Provides:

"Words used in these Revised Statutes in the present tense includes **the future** as well as the present. * * * * * * * The word person includes a corporation as well as a natural person. * * * * * * * * * * * * * * * * "

Sec. 2827, R. S. Idaho, 1887, "Any person, whether a citizen or alien, may take, hold and dispose of property real or personal."

Under the above provisions of our Statutes, a corporation may sell and dispose of its property and franchises.

Williamette Woolen Mfg. Co. vs. Bank of B. C. 119 U. S. 191, 7 Sup. Ct. 187.
Hovelman vs. R. R. Co. 79 Mo. 632.
Klosterman vs. R. R. Co. 36 Pac. 136.
Commercial Electric Co. vs. City of Tacoma, 50 pac. 592.

In the case last cited, the Court says, "The next contention

of appellant's is that, regardless of Ordinance of 318, the Tacoma Electric Company had no authority, and consequently no power to assign its corporate privilegs and franchises to the respondent, for the reason that, without legislative authority, the grantee of a public or *quasi* public franchise cannot assign or sell the same; or, in other words, that a public or *quasi* public corporation cannot disable itself by contract from the performance of public duties which it has undertaken, without legislative consent."

The Tacoma Electric Company did not assign or transfer any franchise or privilege granted to it by the State. It simply assigned to respondent a privilege which the city, in plain terms, had granted to it and its assigns; and that right, in our judgement was included in that class of property which the statutes provides may be bought, held, mortgaged, sold and conveyed by a corporation organized in accordance with the laws of this state."

In People vs. Mutual Gaslight Co. 38 Mich, 154, it was held that the right of a gas company to lay pipes in a street under permission of a municipal government is not a state franchise, but a local easement, resting in contract or license."

Second. The city cannot question, in this proceeding, the right of the Plaintiff Company to own and hold its property and franchises; that this right can only be questioned in an action of proceeding brought for that purpose, and cannot inquire in to it collaterally.

Banks vs. Mathews, 98 U. S. 628.
Telegraph Co. vs. Telegraph Co., 22 Cal. 398.
Water Co. vs. Clarkin, 14 Cal. 544.
Oil Co. vs. Railroad Co. 32 Fed. 22.

Jones vs. Habersham, 2 Sup. Ct. Rep. 336; 2 Mor.

Savings & Trust Co. vs. Bear Valley Irr. Co. 112 Fed. 693.

Priv. Corp. 648 to 653 inclusive; also 709, 711, 746.

Again, the City is estopped to question this transfer as the record shows in 1891, the Boise Water Company, an Idaho corporation, transferred all its property and franchises to the Artesian Hot & Cold Water Company, and that for a period of about ten years, the City dealt with said corporation, made contracts with it, and never, at any time, questioned its right to become the successor of the Boise Water Works Company in its property and franchises; and that from the time of the acquisition by this Plaintiff company of this property and franchises up to the time of the commencement of this suit, the city had never questioned the right of this company to become the owner of its property and franchises. It is admitted by the pleadings that, the Artesian Hot and Cold Water Company, the immediate predecessor in interest of the complainant company of its property and franchises, caused such proceedings to be had in an action brought by it in the District Court of the Third Judicial District of the State of Idaho, Ada County, that the judgment and decree of said court has been made and entered therein dissolving said Idaho Company.

If the Defendant City herein intended to object to the right of the Artesian Hot & Cold Water Company to go out of the business or sell its franchise and property, in good faith it should have appeared in said action and objected or contested the right of said company to be dissolved or transfer its property and franchises. The laws of the State provide as follows:

Sec. 5185, R. S. Idaho, 1887, "A Corporation may be dissolved by the District Court of the County where its office or principal place of business is situated upon its voluntary application for that purpose.

Sec. 5188. "If the Judge is satisfied that the application is in conformity with this Title, he must order it to be filed with the Clerk, and that the Clerk give not less than thirty days notice of the application, by publication in some newspaper in the county, and if there are none such, then by advertisements posted up in three of the principal public places in the county."

Sec. 5189. "At any time before the expiration of the time of publication, any person may file his objections to the application."

In the case of Santa Rosa R. Co. vs. Central Street Ry. Co. decided by the Supreme Court of California, 38 Pac. 986, the Court says, "From the principles above laid down, it follows that no one but the government can avail itself of a ground of forfeiture of a public grant; and that the government, being the sole judge of the propriety of such action, may waive the right to enforce or declare a forfeiture. Such waiver may be by express legisative action, or may be inferred from other acts of the governmental authority. Accordingly, when the State, or any subordinate governmental body to whose charge the matter has been committed, after knowledge of the act or omission constituting a ground of forfeiture, does any act which unequivocally recognizes the franchise as still existing in force, a waiver of the forfeiture will be inferred. And if such act of recognition has the effect of causing the holder of the franchise to incur expense which he would not have incurred had the forfeiture been insisted on, or otherwise to change his position, the inference of a waiver becomes con-

clusive, on the ground of estoppel. These propositions are supported by an overwhelming weight of authority; indeed, no case to the contrary has been brought to our attention.

New Orleans, C. & L. R. Co. vs. City of New Orleans. 44 La. Ann. 748, 11 South, 77.

Chicago, R. I. & P. R. Co. vs. City of Joliet, 79 Ill. 25, 37;

City of Atlanta vs. Gate City Gaslight Co. 71 Ga. 106, 125.

State vs. Fourth N. H. Turnpike, 15 N. H. 162;

Martel vs. East St. Louis, 94 Ill. 67;

Trustees of McIntire Poor School vs. Zanesville C. &

State vs. Mississippi, O. & R. R. Co., 20 Ark. 495;

In re New York El. R. Co., 70 N. Y. 338;

State vs. Taylor, 28 La. Ann. 460.

"In the present case the acts of recognition by the city counsel of the continued existen ce of plaintiffs franchise have been numerous and unequivocal. For 14 years, of which at least 11 years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders and ordinances, and by its pleadings in a judicial proceeding, recognized paintiff's franchise as valid and in force, and insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expenses in paving the public street, in paying taxes, and in other ways, which it would certainly not have occurred had the alleged forfeiture been insisted upon."

Under the above authorities there can be no question but

what the defendant city was estopped to question of the right of the Artesian Hot & Cold Water Co., the immediate predecessor in interest of the complainant Company, to own, operate and control its property and franchises, as the city had recognized such right as admitted in the pleadings by entering into contracts with said company for the furnishing of water for fire and street sprinkling purposes for a number of years. This being true, then such a defense cannot be interposed successfully to the first cause of action set forth in complainant's complaint. A cause of action which accrued during the time the Artesian Hot & Cold Water Company (herein designated the Idaho Company) owned, operated and controlled these waterworks, there can be no question as to the right of said Idaho Company to assign such claim to the Plaintiff Company herein. Any claim which will survive to the personal representatives, can be assigned; and under the laws of this State, such a claim as the one sued upon herein, would survive.

Sec. 5552, R. S. Idaho, 1887, provides, "Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or inestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime."

"The power to assign and transmit to personal representatives are convertible propositions."

Bixbie vs. Wood, 24 N. Y. 607.
Dininny vs. Fay, 38 Barb. 18.

"All such rights of action for a tort as would survive to the personal representatives may be assigned."

Tyson vs. McGuineas, 25 Wis. 660.

"Whatever choses in action are transmissible by operation of law are assignable in equity."

Grant vs. Ludlow, 8 Ohio State, 37.

"The better opinion is that a claim arising out of a tort which affects the estate of a person may be assigned, through the rule is otherwise when it arises out of an injury to the person."

Dalms vs. Sears, 13 Or. 47.

"The exception to assignability of choses in action is confined to the wrongs done to the person, the reputation or the feelings in the injured party and to contracts of a purely personal nature, like promises of mariage."

Meech vs. Stoner, 19 N. Y. 29.
John vs. Farwell Co. vs Josephson, 37 L. R. A. 138.

Under the authorities above cited, the city cannot question in this proceeding, the right of the complainant company to take this claim by assignment. And in addition to above authorities, I call the court's attention to the last case cited, a case decided by the Supreme Court of Wisconsin, in the opinion of the court I find the following:

"The record shows that plaintiff is a corporation organized for the purpose of carrying on a general dry-goods business. The point was raised on the trial, and preserved for review, that it did not possess power to acquire by assignment claims for damages in no way connected with its own affairs growing out of the alleged conspiracy to defraud. It does not appear that such claims were in any way necessary to the preservation or enforcement of plaintiff's original claim or that such

purchase was to effect in any way the purposes of its organization, so as to bring its action in that regard within the rules that a corporation may, to preserve its own property and protect its legitimate interests, acquire and enforce liens which would otherwise be outside of the purposes of its organization. A corporation has only such powers as its organic act, charter, or articles of organization confer. This is elementary, but it includes such powers as are reasonably necessary to effect all the generall purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state. From the foregoing, without further discussion, we must hold that plaintiff had no authority to acquire by purchase the various claims for damages on which a recovery was had. But it by no means follows that its want of power can be taken advantage of by the respondents in this action. Formerly want of corporate power was an effective weapon, both for defense and attack, in the hands of private parties; but, without any change whatever respecting the general doctrine of ultra vires as applied to the acts of corporations acting outside the purpose of their creation, there has been a gradual development in the direction of holding that none but a person directly interested in the corporation, or the state, can question such authority. Such development from the rigorous rule which anciently obtained was manifested earliest in the adoption of the rule that, where a corporation has violated its charter in the purchase and requirement of real estate, its title thereto and right to enjoy the same cannot be inquired into collaterlly in actions between private parties or between the corporation and private parties; that it can be questioned only by the state." (See cases cited in opinion of the court.)

But the certificate of incorporation of plaintiff company in direct terms authorizes it to purchase the claim sued upon.

"* * * and of acquiring, using owning and operating all the properties, franchises, rights, claims, privileges and everything pertaining to that certain corporation of the State of Idaho known as "The Artesian Hot and Cold Water Company, Limited, and to be the successor in every respect of said corporation" (Transcript page 94.).

Sec. 2711, R. S. Idaho, 1887, provides, "All corporations formed to supply water to cities or towns, must furnish pure, fresh water to the inhabitants thereof for family use, so long as the supply permits, at reasonable rates and without distinction of person, upon the proper payment therefor, and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge.

The above Statute the court will see requires two things of the corporation: First. To furnish water to the inhabitants of the city so long as the supply permits. Second. To furnish water to the extent of their means in case of fire or other great necessitiy.

Counsel contends that the court erred in giving the peremptory instruction to find for the defendant, in this case, for the reason that the Plaintiff Company alleges in its complaint that, it was beyond its means to furnish water for street sprinkling purposes. The allegation of the complaint in this regard was, not only admitted by the defendant city, but was also proven as a fact upon the trial. This being true, we contend that we had a right to have the jury pass upon the question as to whether or not it was within the means of the company to furnish this water.

Sec. 3, Article 15 of the Constitution of Idaho, provides:

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Under the laws of this State, we contend, that if the waters used for domestic and agricultural purposes is sufficient to exhaust the supply, that, then, and in that event, the city cannot take water for street sprinkling purposes and compel the plaintiff corporation to enlarge its plant at great expense, and to operate the same at large cost by pumping water into its mains, that the City may withdraw the same in any amount it sees fit and sprinkle the streets therewith.

It is admitted by the pleadings that, for sprinkling streets at all times since March, 1900, and prior to August 23, 1901, the city took each day from the said water works system of said Idaho Company, water to the amount of over 250,000 gallons, and to furnish said water into its pipe lines whence it was taken, cost the said Idaho company over $55.00 each day of said taking, and $39.00 per day over and above that the Company's daily expenses would otherwise have been, and that said water was reasonably worth then and there 12½ cents per 1,000 gallons and worth that much to the said city. (par. 18 of the Complaint; Page 15 of the Tr.)

B. S. Howe, the secretary of the complainant company, testified, page 91 of the transcript, as follows, "As to the ability and power of furnishing water by the Artesian Hot & Cold Water Company, during the year 1901, our gravity supplies were 104,000,000 gallons a year, and all the rest we had to pump; all that was furnished beyond that amount had to be pumped from wells. Our gravity flow was sufficient outside of lawn sprinkling in summer, to furnish water for domestic purposes; taking in the lawn, it was not sufficient during the summer months. Provided no water had been used for sprinkling in the summer months of 1901, it would have required on an average, 400,000 gallons a day to be pumped. On account of the water taken by the city for sprinkling purposes it would take a difference of about five hours a day of pumping during the sprinkling season. In 1900, I can't exactly tell, but it required about ten per cent less extra pumping for sprinkling during that season. All the cold water that was used for sprinkling the streets was obtained by pumping. The power that runs our pump is steam-power; we use coal for fuel. It took about five hours more pumping last year every day to supply the water that was used for sprinkling the streets."

Does not the above state of facts show conclusively in this action that it was beyond the means of the plaintiff corporation and its predecessors in interest, to furnish the city water for street sprinkling purposes? Should not the plaintiff at least have had the right to submit this question as a question of fact to the jury for their consideration, or will this court say that the language of our Statute "to the extent of their means" has no limitation whatever, or that they must furnish this water to the full extent of the financial resources of the

company and its stock-holders, or that it must cease business and not even supply water for domestic purposes?

We are confident that the language of the Statute does not mean or sustain this construction which was the construction placed upon it in effect by the Trial Court.

It is admitted by the pleadings that, at no time prior to 1900, did the city ever take or procure from the predecessors in interest of the complainant company, water for sprinkling the streets, free of charge. That contracts had been made by the city with the Water Company for water purpose; and that the contracts had been faithfully carried out and were approved by the city; and that water used for this purpose had always been paid for. That to carry out these contracts, it became and was necessary, and that said company was obliged to, and did go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand-pipes, in the increasing of its pumping plant, in the purchasing of steam boiler, engine and pump, and in various other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said waterworks for all other purposes than street sprinkling, and such said extra expense was incurred in the pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such cotinuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street purposes was conceded, acquiesced in, and respected by the defendant and by all persons : and defendant contracted

thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collecting the same both by legal proceedings in the courts and otherwise."

It is also admitted in the pleadings Par. 16, of the Complaint, Page 13 of the Tr., "That the Idaho Company had a several and separate contract with said city for each of the years 1896, 1897, 1898 and 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the city agreed to pay to the said water company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city."

The defendant city, as shown by the above admission, having by its contract and dealings with the Idaho company, induced it to make the large expenditures above set forth in reliance upon its contract to pay for water, will not now be permitted after such expenditure has been made, and in reliance upon which, the water company enlarged and extended its waterworks to claim and take without compensation the water so supplied by the waterworks company free of charge; and in this connection, I call the court's attention to the case of Illinois Trust & Savings Bank vs. Arkansas City 76 Fed. 271.

And in the opinion of the court, the court say, "There is another conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the

representations of the existence and of the execution of this contract, which it records and its conduct have constantly made, and in reliance upon which, the gas company and the water company constructed and extended the waterworks, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he had purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and ffraud.

Paxon vs. Brown, 27 U. S. App. 49, 60, 10 C. C. A. 135, 143, and 61 Fed. Rep. 874, 881;
Pence vs. Arbuckle, 22 Minn. 417;
Cairncross vs. Lorimer, 3 Macq. H. L. Cas. 827, 829;
Dickerson vs. Colgrove, 100 U. S. 578, 582,25 L ed. 618, 620;
Faxon vs. Faxon, 28 Mich. 159;
Kirk vs. Hamilton, 102 U. S. 68, 75, 26 L. ed.79, 81;
Evans vs. Snyder, 64 Mo. 516.

This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in Zabriskie vs. Cleveland, C. & C. R. Co. 64 U. S. 23 How. 381, 400, 401, 16 L. ed. 488, 497, 498, in which the supreme court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted

the circulation of bonds that carried it; "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

Re Omaha Bridge Cases, 10 U. S. App. 98, 188, 190, 2 C. C. A. 174, 239, 240, and 51 Fed. Rep. 309, 326, 327;

Butler vs. Cockrill, 20 C. C. A. 122, 73 Fed. Rep. 945.

In a business transaction like that of procuring the construction of waterworks and the use of the water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations.

Safety Insulated Wire & C. Co. vs. Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. Rep. 140, 143, 25 U. S. App. 166;

San Francisco Gas Company vs. San Francisco, 9 Cal. 453, 468, 469, 471;

Columbus Waterworks vs. Columbus, 48 Kan. 99, 113, 15 L. RA 354;

Fergus Falls Water Co. vs. Fergus Falls, 65 Fed. Rep. 586, 591;

National L. Ins. Co. vs. Huron Bd. of Edu. 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. Rep. 778;

National Tube Works Co. vs. Chamberlain, 5 Dak. 54;

Com. vs. Philadelphia, 132 Pa. 288;

New Orleans Gaslight Co. vs. New Orleans, 42 La. Ann. 188, 192.

Tacoma Hotel Co. vs. Tacoma Light & W. Co. 3 Wash. 316, 325, 14 L. R. A. 669;

Wagner vs. Rock Island, 146 Ill. 139, 21 L. R. A. 519;

Vincennes vs. Citizens Gaslight Co. 132 Ind. 114, 126, 16 L. R. A. 485;

Indianapolis vs. Indianapolis Gaslight & C. Co. 66. Ind. 396, 403; State, Read, vs. Atlantic City, 49 N. J. L 558, 562."

Counsel has been unable to find any case where this statute requiring a corporation to furnish water to the extent of its means, free of charge, for fire or other great necessities, has ever been held to apply to corporations supplying water from Artesian Wells developed upon the private property of the corporation; or where water has been supplied by means of pumping, at great expense to the corporation. All the cases where this or similiar statutes have been held to apply to water corporations, were cases in which the water was appropriated from the public waters of the state, and taken out or diverted by means of canals or aqueducts.

Suppose the paintiff corporation and its predecessors in interest was, and had been, supplying the city with water from a public stream by means of a canal or aqueduct, if the contention of the city be correct, then and in that event, the city would have as much right to demand of the corporation, if the supply carried was only sufficient for domestic purposes, that the corporation proceed at great expense and enlarge its ditch or canal in order to meet the needs of the city for street sprinkling purposes, as it has in this case, to

demand that the company at the expense of $39.00 a day, as admitted by the pleadings, continue to pump water into and through its mains in order that the city may have free water to sprinkle its streets. It seems to counsel that, the mere statement of this proposition is sufficient to demonstrate that the statute or that the legislature in enacting the same, never intended or contemplated any such results.

These sections of our statute involved in this case, have been passed upon by the Supreme Court of Idaho in the cases of:

> The Bellevue Water Co. vs. City of Bellevue, 36 Pac. 693, and City of Boise vs. Artesian Hot & Cold Water Co. 39 Pac. 562.

From a careful reading of these cases, I think the court will be convinced of the right of the plaintiff company to recover in this action. The last case cited was a case in which the defendant city herein, brought an action against the Artesian Hot & Cold Water Co. (The predecessor in interest of the Plaintiff Company) to compell it to furnish water, free for fire purposes. And the Supreme Court of this State held that, the water company, not having been previously authorized by ordinance or by contract with the city, to supply water to the town, as provided by Sec. 2710, that the company was under no obligation to furnish the water for such purposes. But if the corporations had no power, without such ordinance or contract, to furnish water to the city for these purposes, it does not follow that the city can therefore take the water of these corporations and refuse to pay for it after they had the benefits of it, even, of the corporation is not authorized to deliver water

to the city for these purposes; the water yet remains as the private property of the corporation, the city cannot steal it, or forcibly appropriate it and thereafter refuse to pay for it.

The other questions involved in this case have been discussed at length in the brief filed by the senior counsel herein, and I do not deem it necessary to again take up the time of the court with those questions, and, satisfied that error was committed by the trial court in the matters hereinbefore set forth, for which the judgment should be reversed and a new trial awarded.

Respectfully submitted,

ALFRED A. FRASER,
Of Counsel for Plaintiff in Error.

No. 866

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT,

Plaintiff in Error,

vs.

G. KAUFMAN,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No 1.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the United States District Court for the District of Alaska, Division No. 1.

OHLIN H. ADSIT,

Plaintiff,

vs. No. 75A.

G. KAUFMAN,

Defendant.

Stipulation Extending Time to Docket Cause.

It is hereby stipulated by and between the parties to the above-entitled action and by their respective attorneys, that owing to the uncertainty of the arrival at, and departure from, Juneau, Alaska, of the United States Mails, the plaintiff herein, said Ohlin H. Adsit, shall have until the 15th day of August, 1902, within which time to file his record on writ of error, in the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, in the same manner with the like effect as if done by order of the Court.

Dated July 17, 1902.

JOHN G. HEID,
Attorney for Plaintiff.
MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: No. 75A. In United States District Court for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Stipulation. Filed July 16, 1902. W. J. Hills, Clerk.

United States of America,
District of Alaska, } ss.
Division No. 1.

I, W. J. Hills, Clerk United States District Court for District of Alaska, Division No. 1, do hereby certify that the above and foregoing is a full, true and correct copy of a stipulation filed this day in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the Court this 16th day of July, 1902.

[Seal] W. J. HILLS,
Clerk United States District Court for District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy Clerk.

[Endorsed]: No. 866. United States Circuit Court of Appeals for the Ninth Circuit. Ohlin H. Adsit, vs. G. Kaufman. Stipulation Extending Time to Docket Cause. Filed July 25, 1902. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

In the United States District Court for the District of Alaska, Division No. 1.

OHLIN H. ADSIT, Plaintiff,

vs.

G. KAUFMAN, Defendant.

No. 75A.

Writ of Error.

The President of the United States of America, to the Judge of the United States District Court, for the District of Alaska, Division No. 1, Greeting:

Because of the record and proceedings, and also in the rendition of the judgment of a plea which is in the said United States District Court, for the District of Alaska, Division No. 1, before you, between Ohlin H. Adsit, as plaintiff, and G. Kaufman, as defendant, a manifest error hath happened to the great damage of the said Ohlin H. Adsit, plaintiff in error, as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you

have the same at the courtrooms of the said court in the Customs-house Building, in San Francisco, California, on the 25th day of July, 1902, in the said Court of Appeals to be there and then held, that the record and proceedings aforesaid be inspected; the said United States Circuit Court of Appeals may cause further to be done there to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord, one thousand nine hundred and two, and of the independence of the United States the one hundred and twenty-sixth.

[Seal] W. J. HILLS,

Clerk of the United States District Court, for Alaska, Division No. 1.

The above writ of error is hereby allowed.

M. C. BROWN,

Judge United States District Court, for District of Alaska, Division No. 1.

[Endorsed]: No. 75A. United States District Court, at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Writ of Error. Filed June 26, 1902. W. J. Hills, Clerk,

In the United States Circuit Court of Appeals, for the Ninth Circuit.

OHLIN H. ADSIT,
Plaintiff,
vs.
G. KAUFMAN,
Defendant.

Citation.

United States of America—ss.

To G. Kaufman, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, California, on the 25th day of July, 1902, pursuant to a writ of error filed in the clerk's office in the United States District Court, for the District of Alaska, wherein Ohlin H. Adsit, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice not be done to the parties in that behalf.

June 25th, 1902.

M. C. BROWN,

Judge United States District Court, for District of Alaska, Division No. 1.

Received copy of the within citation, June 25, 1902, and service admitted.

MALONY & COBB,
Attorneys for Defendant in Error.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ohlin H. Adsit, Plaintiff in Error, vs. G. Kaufman, Defendant in Error. Citation. Filed June 26, 1902. W. J. Hills, Clerk.

United States of America, } ss.
District of Alaska. }

Pleas and proceedings began and held in the District Court of the United States, for the District of Alaska, Division No. 1, at the November term, 1901. Present: the Honoroble MELVILLE C. BROWN, Judge.

OHLIN H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant. } No. 75A.

Caption.

On May 13th, 1901, the plaintiff filed his complaint in said cause, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska, Division No. 1.

OHLIN H. ADSIT,
Plaintiff,

vs.

G. KAUFMAN,
Defendant.

Complaint.

The plaintiff complains and alleges:

1.

That plaintiff is the owner of an undivided one-half part or interest of, in, and to lot numbered four in block numbered four, with the improvements thereon, situated in the town of Juneau, Alaska, according to the official plat of said town made by G. W. Garside, U. S. Surveyor, and approved by the trustee of the townsite of said Juneau, Alaska, and was such owner during all the times hereinafter mentioned.

2.

That on the 1st day of April, 1894, at the said town of Juneau, Alaska, and for some time thereafter, the defendant herein carried on a gereral dry goods and clothing business, in the building situated upon said lot No. 4, in said block No. 4, in said town, under the name of the "New York Store," also under the name and style of "Toklas & Kaufman," and thereafter the said defendant carried on and continued the said business at the same said place, under the name and style of "G. Kaufman & Sons."

3.

That the said defendant carried on the said business, as aforesaid, and for that purpose occupied the main store building situated upon said lot No. 4, in said block No. 4, in said town of Juneau, by permission of the plaintiff, from the 1st day of April, 1894, to the 1st day of July, 1896.

4.

That the use of the undivided one-half part or interest of the said premises for the said period was reasonably worth six hundred and fifty dollars ($650.00).

5.

That the defendant has not paid the same, nor any part thereof, though plaintiff, about the time of the first occupancy of said premises by defendant, notified, and demanded of defendant to pay to this plaintiff the rent for said premises, occupied by him, as aforesaid, but the defendant occupied the said premises for the period of two years and two months, and during all of said period has persistently refused and failed, and still refuses and fails to pay plaintiff the said sum of $650.00, or any part thereof, for the use and occupation of said premises, as aforesaid.

Wherefore plaintiff demands judgment against the said defendant, for the sum of six hundred and fifty dollars, together with interest thereon at the rate of eight per cent, per annum, from the 1st day of July, 1896, and for the costs of this action.

JOHN G. HEID,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

O. H. Adsit, being first duly sworn says, I am the plaintiff named in the above-entitled action, that I have read the foregoing complaint, and know the contents thereof, that the same is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 11th day of May, A. D. 1901.

[Notarial Seal] JOHN G. HEID,
Notary Public for Alaska.

[Endorsed]: No. 75A. In the United States District Court, District of Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Complaint. Filed May 13, 1901. W. J. Hills, Clerk. J. G. Heid, Attorney for Plaintiff.

In the United States District Court for Alaska, Division No. 1, at Juneau.

OHLIN H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant. } No. 75A.

Answer.

Now comes the defendant G. Kaufman, by his attorneys Maloney & Cobb, and demurs to so much of the plaintiff's complaint herein, as seeks to recover for rents for the period between the 1st day of April, 1884, and May 15th, 1895, and for grounds of demurrer say:

That this action for the rents specified has not been commenced within the time required by law, and a recovery thereof is barred by the statute of limitations in such cases made and provided, of which defendant prays judgment of the Court.

And for answer to the remaining portion of said complaint defendant alleges as follows:

1.

He admits that plaintiff is now the owner of an undivided one-half interest in said lot 4 in block 4, Juneau. but he denies that plaintiff was such owner at any time prior to the 1st day of July, 1896, and especially during the time between April 1st, 1894, and July 1st, 1896.

2.

He admits the allegations of paragraph 2 of said complaint.

3.

Referring to paragraph 3 of said complaint defendant specifically denies that he ever occupied said building by permission of plaintiff, or under him, or in recognition of any title of plaintiff herein; that during all the times defendant occupied said premises, he was occupying, using and paying rent therefor, under another person who was in possession and claiming title to the same adverse to any claim of plaintiff thereto.

4.

Defendant denies that the use of the undivided half part of said premises was worth the sum of $650.00 or any greater amount than the sum of $15.00 per month aggregating $346.66⅔.

Wherefore defendant prays that he be discharged with his costs and disbursements herein incurred.

MALONY & COBB,
Attorneys for Defendant.

United States of America,
District of Alaska. } ss.

J. F. Malony, being first duly sworn, deposes and says: I am one of defendant's attorneys in the above-mentioned action; I have heard read the foregoing answer, and know the contents thereof and the matters and things therein set out are true as I verily believe, and I make this verification because the facts are within my one knowledge, and the defendant is a nonresident of the District of Alaska.

J. F. MALONY.

Subscribed and sworn to before me this 18th day of July, 1901.

[Notarial Seal] E. F. ROSE,
Notary Public in and for Alaska.

Service of the above and foregoing answer is hereby admitted to have been duly and legally made in the District of Alaska, this 25th day of July, 1901.

JOHN G. HEID,
Attorney for Plaintiff.

[Endorsed]: Original. No. 75A. In the United States District Court, for Alaska, Division No. 1, at Juneau. Ohlin H. Adsit, Plaintiff, vs. G. Kaufman, Defendant. Answer. Filed July 25, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

And afterwards, to wit, on the 1st day of October, 1901, the following proceedings were had and appear of record in said cause, to wit:

O. H. ADSIT
vs.
G. KAUFMAN } No. 75A.

Order Overruling Demurrer.

And now, on this day, this cause came on for hearing before the Court in chambers upon the demurrer of defendant to plaintiff's complaint herein, the plaintiff being represented by John G. Heid, the defendant by Malony & Cobb; and after argument had thereon, and the Court being fully advised in the premises, overrules said demurrer, and it appearing from the record in this case that the defendant had heretofore answered, the plaintiff is given ten days hereafter in which to reply; to which said ruling and order of the Court defendant by counsel excepts.

In the United States District Court, for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant. } No. 881.

Reply.

The plaintiff replies to the answer of defendant:

1.

Denies that the defendant paid rent for said premises to another or other person who was in possession of the same, or occupied the said premises under said person, as in paragraph 3 of said answer alleged.

JOHN G. HEID,
Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

Ohlin H. Adsit, being first duly sworn, says: I am the plaintiff in the above-entitled action; that I have read the foregoing reply and know the contents thereof; that the same is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 8th day of November, 1901.

[Notarial Seal] JOHN G. HEID.
Notary Public for Alaska.

[Endorsed]: No. 75A. In United States District Court, District of Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Reply. Filed November 11, 1901. W. J. Hills, Clerk. J. G. Heid, Attorney for Plaintiff.

In the United States District Court for Alaska, Division No. 1, at Juneau.

O. H. ADSIT,
Plaintiff,
vs.
No. 75A.
G. KAUFMAN,
Defendant.

Motion to Strike Reply from the Files and to Enter Judgment on the Pleadings.

Now comes the defendant and moves the Court to strike the reply of the plaintiff from the files herein and to render judgment on the complaint and answer, and for cause shows:

That on the 1st day of November, 1901, by order then made the plaintiff was required to file a reply in the days from and after said date; that no reply was filed within said time, nor was any extension of said time had or applied for; that on November 11th, 1901, the plaintiff without having served the same or obtained any leave of Court so to do, filed a reply in this cause, all of which is manifest from the record herein.

MALONY & COBB,
Attorneys for Defendant.

Service of the above and foregoing motion is hereby admitted to have been duly and legally made in the District of Alaska, this 5th day of ————, 190—.

JOHN G. HEID,
Attorney for Plaintiff.

[Endorsed]: Original. No. 75A. In the United States District Court for Alaska, Division No. 1, at Juneau. O. H. Adsit, Plaintiff, vs. G. Kaufman, Defendant. Motion to strike reply from the files and to enter judgment on the pleadings. Filed Dec. 5, 1901. W. J. Hills, Clerk. Maloney & Cobb, Attorneys for Defendant.

And afterwards, to wit, on the 16th day of December, 1901, the following further proceedings were had and appear of record in said cause, to wit:

O. H. ADSIT
vs.
G. KAUFMAN. } No. 75A.

Order Denying Motion to Strike, etc.

Now, on this day, this cause came on to be heard upon the motion of the defendant to strike from the files the reply of plaintiff, filed herein, and for judgment as prayed for in the answer of the defendant, both parties being represented in court by their respective counsel; and after argument had, and the Court being fully advised in the premises, denies said motion, to which order and ruling of the Court defendant by counsel excepts.

In the United States District Court, for the District of Alaska, Division No. 1.

OHLIN H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant. } No. 75A.

Bill of Exceptions.

Be it remembered that this case came on regularly for trial at Juneau, Alaska, on Tuesday, the 14th day of January, 1902, before the Honorable Melville C. Brown, District Judge for the said District, in Division No. 1, presiding, and a jury which was then and there duly impaneled and sworn; the plantiff appearing by John G. Heid, and the defendant, by Maloney & Cobb; and upon the impaneling of the jury and after a statement of the case to the jury by counsel, on both sides, the following proceedings were had and taken:

In the United States District Court, for the District of Alaska, Division No. 1.

O. H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant.

Transcript of Testimony.

By Mr. HEID.—The plaintiff now offers in evidence the findings of fact and judgment in the case of O. H.

Adsit vs. John F. Malony, found in Journal No. 6 of the records of the United States District Court for the District of Alaska, Division No. 1, at page 181.

The defendants object to the introduction of the findings of fact as immaterial and not binding on the defendants in this case, being between other and different parties. The judgment may be admissible, but the findings are objected to.

(Objection to the findings of fact sustained on the part: the same are not a part of the judgment. Exception.)

Whereupon Mr. Heid read said judgment in evidence as follows:

OLIN H. ADSIT,

Plaintiff,

vs.

No. 508.

JOHN F. MALONY,

Defendant.

Judgment.

This cause having been regularly called and tried by the Court, and the findings of fact and conclusions of law and the decision thereon in writing, having been duly rendered by the Court, which are now on file in this cause, wherein judgment is awarded in favor of Olin H. Adsit, plaintiff, against John F. Malony, defendant, and for costs, on motion of Johnson & Heid, plaintiff's attorneys,

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendant, for the

recovery of possession of an individual one-half interest of, in and to lot number four, in block number four, situated in the town of Juneau, Alaska, and as described in the complaint on file herein, and that the plaintiff have such judgment as aforesaid against the defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant; and that the plaintiff be and he is hereby decreed to be the true and lawful owner of the land described in the complaint and hereinbefore mentioned;

And it is hereby further ordered, adjudged. and decreed that the plaintiff do have and recover his costs hereby taxed at $ against the defendant.

Dated August 10th, 1897.

By the Court.

ARTHUR K. DELANEY,

Judge.

Whereupon, O. H. ADSIT, the plaintiff, being first duly sworn, on his oath testified as follows, on

Direct Examination.

(By Mr HEID.)

Q. Mr. Adsit, are you the plaintiff in this action?

A. Yes, sir.

Q. I'll ask you to look at this paper and state what it is?

A. This is a deed from William J. Thompson, the party I bought the half interest of that property of, lot four, block four.

Q. How did you come to obtain that deed?

(Testimony of O. H. Adsit.)

A. I heard the property was for sale, and Mr. Hall, president of the Tacoma Grocery Co., made the purchase for me.

(Plaintiff now offers the deed in evidence.)

By the COURT.—Well, who is it executed by, in favor of whom, what consideration—it doesn't prove itself.

Q. By whom is the deed signed, Mr. Adsit?

A. William J. Thompson, and Ellen W. Thompson, his wife, and J. M. Brown, and Samuel St. Clair, as witnesses.

By the COURT.—Did you see them sign it?

A. No, sir, I didn't.

Q. Do you know the handwriting of those people?

A. No, sir; it came that way through the mail.

Q. And the only way you know it was signed and delivered is from the way it appears on that paper?

A. Yes, sir; Mr. Hall was president of the Tacoma Grocery Company, and I was working for it at the time, and he made this purchase from the West Coast Grocery Company.

(By Mr. COBB.)

Q. You mean that you were informed by him that was so? A. Yes, sir.

Q. Then you only know it by hearsay?

By Mr. HEID.—I now renew my offer of the deed.

(Objected to by counsel for defendants, as not proved so as to be competent evidence. It is not properly acknowledged, appearing to have been acknowledged in some county clerk's office not known to the laws of

(Testimony of O. H. Adsit.)

Alaska. It appears to have been acknowledged by J. M. Brown, clerk of the Superior Court somewhere, which doesn't appear except by the seal.)

By the COURT.—Evidently this paper was acknowledged by someone in Washington, where they have a Superior Court, and the officer's seal seems to indicate that it was the Superior Court of Yakima County. There was never such a county in Alaska, and no such officer to acknowledge it. The paper as it now stands is not entitled to be received in evidence. If the signatures of the parties can be proved without reference to any acknowledgment, it would be a good common-law contract, but Mr. Adsit doesn't seem to know anything about their signatures, or anything else. The Court refuses to allow this to go in evidence on the proof so far made.

(Exception.)

By Mr. HEID.—Plaintiff now offers in evidence the complaint in the action No. 508 in the United States District Court for Alaska, entitled O. H. Adsit vs. John F. Malony, being the complaint on which the judgment heretofore introduced is based.

(Objected to as irrelevant, incompetent and immaterial. The judgment shows on its face what was in controversy.)

By the COURT.—In this complaint the plaintiff says that he has been, and now is, entitled to the possession and right of possession, and seeks to recover possession. The evidence proper to be admitted, if anything at all is

(Testimony of O. H. Adsit.)

proper, would be what would constitute a judgment-roll; that would be the complaint, answer, reply if there was one, and the judgment entered. The statute enumerates just what shall constitute a judgment-roll, and whatever that is, would of course be competent evidence. This complaint is therefore admitted in evidence.

(Exception by defendants.)

(Said complaint is as follows:)

Plaintiff's Exhibit "A."

In the United States District Court for the District of Alaska,

OHLIN H. ADSIT,
Plaintiff,

vs.

JOHN F. MALONY,
Defendant.

Complaint.

The plaintiff complains and alleges:

I.

That on the 29th day of April, 1891, and for more than nine years prior thereto, the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession, and have at all times mentioned herein been the owners, and plaintiff now is the owner by reason of such prior occupation and possession of an undivided one-half part interest of, in, and to that certain piece or parcel of land, the same being fifty feet in width by one hundred feet in length, situated on the corner of

(Testimony of O. H. Adsit.)

Second and Franklin streets in the town of Juneau, District of Alaska, better described as lot numbered four (4) in block numbered four (4) according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, and that plaintiff is entitled to the possession thereof. That one James Winn is the owner of the other undivided one-half part interest of, in and to said described premises.

II.

That while plaintiff and his grantors were so possessed the defendant and his grantor, on or about the 29th day of April, 1891, without right or title so to do, entered thereon and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld, and still wrongfully withholds the possession thereof from him, the said plaintiff.

Wherefore, the plaintiff prays judgment against the defendant: 1. For the recovery of the possession of an undivided one-half part or interest of, in and to the whole of said described premises; 2. For plaintiff's costs and disbursements in said action.

JOHNSON & HEID,
Plaintiff's Attorneys.

The United States,
District of Alaska. } ss.

Ohlin H. Adsit, being first duly sworn, says: I am the plaintiff named in the foregoing entitled action; that I

(Testimony of O. H. Adsit.)

have read the foregoing complaint and know the contents thereof; that the said complaint is true as I verily believe.

OHLIN H. ADSIT.

Subscribed and sworn to before me this 22d day of May, 1896.

F. D. KELSEY. [L. S.]
Notary Public for Alaska.

[Endorsed]: No. 508. In United States District Court, District of Alaska. Plaintiff's Exhibit "A," 75A. Plaintiff's Exhibit "E," retrial. O. H. Adsit vs. Jno. F. Malony. Complaint. Filed May 25, 1896. Charles D. Rogers, Clerk. Johnson & Heid, Attorneys for Plaintiff. 2-259.

By Mr. HEID.—I now offer this judgment, or writ of possession in evidence in said Case No. 508 of this court.

(No objection.)

By the COURT.—I am not clear that this writ of possession is a part of the judgment-roll, but if there is no objection it may go in. You better also offer whatever comprises the judgment-roll—answer, reply and other pleadings.

By Mr. HEID.—I also offer the amended answer in that same case, the reply and the writ of possession.

(No objection.)

(Which said exhibits are as follows:)

(Testimony of O. H. Adsit.)

Plaintiff's Exhibit "E."

In the United States District Court, for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,

vs.

JOHN F. MALONY, Defendant.

No. 508.

Writ of Possession.

The President of the United States to the United States Marshal, for the District of Alaska, Greeting:

Whereas, on the 20th day of August, 1897, Ohlin H. Adsit, the plaintiff, recovered a judgment in the said United States District Court, for the District of Alaska, against John F. Malony, defendant, for the possession of certain premises in said judgment and decree hereinafter more particularly described, and also for the sum of $———, costs and disbursements, as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said Court, at Sitka, in said District of Alaska, and the said judgment was docketed in said clerk's office, in said District, on the day and year first above written.

Now, therefore, you, the said marshal, are hereby commanded and required to place the said Ohlin H. Adsit

(Testimony of O. H. Adsit.)

in the quiet and peaceable possession of the lands and premises in said judgment and decree, described as follows, to wit: An undivided one-half part or interest of, in, and to lot No. 4 in block No. 4, situated in the town of Juneau, Alaska, according to the plat and survey of said town of Juneau, made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau.

Witness, Honorable CHARLES S. JOHNSON, Judge of said United States District Court, for the District of Alaska, at the courthouse in the town of Sitka, in said District, and the seal of said Court this 20th day of September, 1897.

[Seal] ALBERT D. ELLIOT,
Clerk.

[Endorsed]: No. 508. In United States District Court, District of Alaska. Plaintiff's Exhibit "B," retrial. Ohlin H. Adsit vs. John F. Malony. Writ of Possession. Returned and filed October 12th, 1897. Albert D. Elliot, Clerk. United States, District of Alaska—ss. I hereby certify that I received the within writ of possession on the 20th day of September, 1897, and that on the 21st day of September, 1897, I served the same by placing the within named Olin H. Adsit in the peaceable and quiet possession of the within described premises personally at Juneau, Alaska. James M. Shoup,

(Testimony of O. H. Adsit.)

U. S. Marshal. By William M. Hale. Plf. Ex. "E," 75A. Marshal's fee, 75c. Paid by O. H. Adsit.

Plaintiff's Exhibit "C."

In the United States District Court, in and for the District of Alaska.

OHLIN H. ADSIT,

Plaintiff,

vs.

JOHN F. MALONY.

Defendant.

Amended Answer.

Leave of Court being first had and obtained, for answer to the complaint in the above-entitled action, the defendant answering says:

1st. That he denies that on the 29th day of April, 1891, or at any other time, or at all, or that for more than nine years prior thereto, that the plaintiff and his grantors have been the owners by right of prior occupancy, and actual possession, or have at any time been the owners of the premises hereinafter described, or that the plaintiff is now the owner, or ever was such owner by reason of prior occupancy and possession, or by any other reason whatever, of an undivided one-half part or interest of, in, and to lot number four (4), in block number four (4), in the town of Juneau, and denies that the plaintiff is entitled to the possession thereof.

(Testimony of O. H. Adsit.)

Admits that one James Winn is the owner of an undivided one-half interest in the above-described premises.

Denies that on the 29th day of April, 1891, or at any other time or at all, did the defendant or his grantors, without right or title enter upon said premises and oust and eject the plaintiff and his grantors therefrom, or that they have from said time, or at all, wrongfully withheld or withholds the possession from the plaintiff.

SECOND.

For his second defense and answer, and by way of new matter the defendant alleges:

1st.

That on or about the 24th day of November, 1891, one Alfred G. Gamel was in the quiet and peaceable possession and occupancy of an undivided one-half interest of lot number four (4), in block number four (4), according to the plat and survey of the town of Juneau, made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now as Juneau, Alaska.

2d.

That on or about the 20th day of January, 1894, the said Alfred H. Gamel conveyed and transferred to this defendant all his right, title, and interest in and to the said lot and the buildings and premises thereon situated, and thereupon the said Gamel delivered the possession of said lot and premises to this defendant.

(Testimony of O. H. Adsit.)

3d.

That ever since said time this defendant by himself and his tenants have been in the quiet and peaceable possession and occupancy of said lot and premises, and now is in the quiet and peaceable possession of the same.

4th.

That a period of more than three years has elapsed since this defendant and his grantors have been in the quiet and peaceable possession of said lot and premises, and that the said defendant's estate and interest in said premises has not expired or ended, and that by reason thereof the plaintiff ought not now be allowed to maintain his said action.

Wherefore, the defendant prays judgment that the plaintiff take nothing by his said suit, and that he be discharged without day, and that he recover his costs and disbursements.

JNO. TRUMBULL,
Attorney for Defendant.

United States,
District of Alaska. } ss.

J. F. Malony, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the above and foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are

(Testimony of O. H. Adsit.)

therein stated on information or belief, and as to those matters that he believes it to be true.

(Signed) J. F. MALONY.

Subscribed and sworn to before me this 8th day of December, 1896.

[Seal] CHARLES D. ROGERS,
Clerk.
By Walton D. McNair,
Deputy.

[Endorsed]: Plaintiff's Exhibit "C," 75A. No. 508. Original. United States District Court for the District of Alaska. Ohlin H. Adsit, Plaintiff, vs. John F. Malony, Defendant. Amended Answer. Service of the within amended answer admitted by copy this 8th day of December, 1896. Johnson & Heid, Attorneys for Plaintiff. Filed December 8, 1896. Charles D. Rogers, Clerk. Walton D. McNair, Deputy Clerk. John Trumbull, Attorney for Defendant.

(Testimony of O. H. Adsit.)

Plaintiff's Exhibit "B."

In the United States District Court, for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,

vs.

JOHN F. MALONY. Defendant.

Reply.

The plaintiff replies to the answer of defendant, and referring to the second defense, denies each and every allegation therein contained, and denies that on or about the 24th day of November, 1891, or any other time, or at all, one Alfred H. Gamel was in the quiet and peaceable possession, or possession at all, and occupancy of an undivided one-half interest, or any interest, of lot numbered four in block numbered four, in the town of Juneau, Alaska, as described in defendant's second defense.

2.

Denies that on or about the 20th day of January, 1894, or at any other time, the said Alfred H. Gamel conveyed and transferred to the defendant all his right, title, and interest, or that the said Gamel had any right, title, or interest to convey, in and to said lot and the buildings therein situated, and that the said Gamel delivered the possession of the said lot to the defendant.

(Testimony of O. H. Adsit.)

3.

Denies that ever since the time mentioned in defendant's second defense, the defendant by himslf and his tenants have been in the quiet and peaceable possession and occupancy of said lot and premises, and that he now is in the quiet and peaceable possession of the same.

Wherefore, plaintiff demands judgment against the defendant as prayed for in the complaint herein.

CHAS. E. PATTERSON and
JOHNSON & HEID,
Attorneys for Plaintiff.

To this answer, we replied as follows:

The United States, }
District of Alaska. } ss.

O. H. Adsit, being first duly sworn says: I am the plaintiff named in the foregoing entitled action; that I have heard read the foregoing reply and know the contents thereof; that the same is true, as I verily believe.

(Signed) O. H. ADSIT.

Subscribed and sworn to before me this 12th day of November, 1896.

CHARLES D. ROGERS,
Clerk.

By Walton D. McNair,
Deputy Clerk.

(Testimony of O. H. Adsit.)

Service with copy this day accepted at Juneau, Alaska, this December 12, 1896.

JOHN TRUMBULL,
Attorney for Defendant.

[Endorsed]: No. ——. In United States District Court, District of Alaska. O. H. Adsit vs. J. F. Malony. Reply. Filed December 12th, 1896. Charles D. Rogers, Clerk. C. E. Patterson and Johnson & Heid, Attorneys for Plaintiff. Plaintiff's Exhibit "G," retrial. Plaintiff's Exhibit "B," 75A.

By The COURT.—Mr. Heid, you may as well read the findings in evidence. The defendants may have an exception; but it might as well all go in.

By Mr. HEID.—Very well, your Honor. Gentlemen of the Jury, the findings in this former case, No. 508, were as follows:

Plaintiff's Exhibit "D."

In the United States District Court, for the District of Alaska.

OHLIN H. ADSIT, Plaintiff,
vs.
JOHN F. MALONY, Defendant.
No. 508.

Findings.

This cause having been regularly called for trial before the Court—a jury trial having been expressly

(Testimony of O. H. Adsit.)

waived by stipulation in open court of the respective parties appearing herein—Johnson & Heid appeared as attorneys for the plaintiff, and John F. Malony, the defend ant herein, appeared in proper person. And the Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

I. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece, or parcel of land, described in the complaint as lot numbered four (4) in block numbered four (4), in the town of Juneau, District of Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau, claiming said lot, piece, or parcel of land in their own right; and the said plaintiff and his grantors, have ever since the date last aforesaid, occupied, used, and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same, in their own right, from that date to the present time, adversely to all the world, and especially against the defendant.

II. That the plaintiff is the owner of an undivided

(Testimony of O. H. Adsit.)

one-half (½) part or interest of, in and to said lot No. 4 in said block No. 4, hereinbefore described, and that the whole of said lot, piece, or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

III. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece, or parcel of land in the complaint described, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff.

As conclusions of law from the foregoing facts, the Court now hereby finds and decides:

1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in and to the said lot, piece, or parcel of land as the same is described in the complaint on file herein, as against the defendant, and all persons claiming or to claim the same, or any part of said right or interest of the plaintiff in and to said lot, piece or parcel of land, under him, the said defendant, and that the defendant has no right, title or interest in or to said land, or any part thereof.

2. That the plaintiff is entitled to a judgment as prayed for in his complaint for the recovery of the possession of an undivided one-half part or interest of, in and to said lot No. 4 in said block No. 4, in said town of Juneau, against said defendant and all persons claiming

(Testimony of O. H. Adsit.)

or to claim the same, or any part thereof, under or through the said defendant.

3. That the plaintiff is entitled to a judgment for costs, to be taxed herein against the defendant.

And judgment is hereby ordered to be entered accordingly.

Dated August 10, 1897.

By the Court.

ARTHUR K. DELANEY,
Judge.

[Endorsed]: No. 508. In the United States District Court, District of Alaska, Plaintiff's Exhibit "C," Retrial—Plaintiff's Exhibit "D," 75A. Ohlin H. Adsit vs. John F. Malony. Findings. Filed August 20, 1897. Charles D. Rogers, Clerk.

Examination of Mr. ADSIT (Continued).

(By Mr. HEID.)

Q. Mr. Adsit, do you know the defendant G. Kaufman? A. Yes, sir.

Q. Do you know whether he carried on a business in the town of Juneau in the building situated on lot four in block four as mentioned in the complaint herein?

A. Well, that's a hard one; I don't know whether it's G. Kaufman or G. Kaufman and Sons.

Q. Well, at any time since you acquired an interest in the building on lot four in block four, has anyone carried on business there at all?

A. Yes, sir; by Mr. Kaufman.

(Testimony of O. H. Adsit.)

Q. Under what name or names was the business carried on?

A. The New York Store; G. Kaufman; Toklas & Kaufman, and G. Kaufman and Sons.

Q. How long, if you know, did they occupy that building for the purposes of carrying on that business?

A. About twenty-six months.

Q. What kind of business did they carry on there?

A. Dry goods and clothing.

Q. Can you state the date they carried on this business from?

A. I think they went in there some time in April, 1894, and was there a little over two years—twenty-six months in all.

Q. Did they ever pay you any rent for the use and occupation of that building?

A. No, sir; not one cent.

Q. Did you ever demand payment of them of that rent?

A. I did; if I remember rightly you served the notice on them.

Q. What was the rental value of that property at the time they went in and during the time they occupied the same? A. About fifty dollars a month.

By the COURT.—That is, for the whole property?

A. Yes, sir; it rented at—.

(Counsel for defendants object on the ground that the witness has not qualified to state rental values.)

(Objection overruled. Exception.)

(Testimony of O. H. Adsit.)

A. Well, I rented it for seventy-five dollars after they went out of it, Mr. Cobb.

By Mr. COBB.—I am addressing my objection to the Court, Mr. Adsit, not to you.

By the COURT.—Mr. Cobb, your objection came too late—that is all.

By Mr. COBB.—Then I move that the answer to stricken out on the ground that the witness has not qualified to testify as to values.

By the COURT.—The witness may be examined as to his qualifications in that respect.

(By Mr. HEID.)

Q. How long have you been a resident of Juneau, Mr. Adsit?

A. About eleven years the 20th of March.

Q. Are you familiar with the location of the different business houses in the town of Juneau?

A. Yes, sir.

Q. You know where this building is situated?

A. I do, sir.

Q. On lot four in block four? A. Yes, sir.

Q. On what street?

A. The corner of Second and Franklin streets.

Q. Are you familiar with the prices paid for rent in the town of Juneau during the time the Kaufman's were in possession of this property? Business houses?

A. I am sir.

Q. What would you say the rental value would be, or

(Testimony of O. H. Adsit.)

was at the time and during the time the defendants occupied this building, situated on lot four in block four in the town of Juneau?

A. I would say it was worth at least fifty dollars a month.

Q. And how much are you suing for?

(Objected to as not the best evidence—the complaint shows that.)

(Objection sustained. Exception.)

By Mr. HEID.—Well, we're suing for half of the rental value anyhow. How much is due you Mr. Adsit from the defendants, as rent? For the use and occupation of that building, as mentioned in the complaint?

Objected as calling for a conclusion of the witness.)

By the COURT.—It's a matter of computation. He has stated the price and the number of months they occupied the building.

Q. Has the defendant ever paid you anything for the use and occupation of those premises, in the way of rent or otherwise? A. No, sir; not a cent.

Q. And that rent as you state, whatever it may amount to, is still due you from the defendants?

A. Yes, sir.

Cross-Examination.

(By Mr. COBB.)

Q. Why didn't you put them out?

A. Put who out?

Q. These people you claim were occupying your prem-

(Testimony of O. H. Adsit.)

ises; if they wouldn't pay their rent, why didn't you put them out?

A. Well, the case was in court, and Mr. Malony being in possession—

Q. They rented from Mr. Malony, didn't they?

A. I think so.

Q. Well, you never rented to them?

A. Not in a sense—

Q. And you never received rent from them?

A. No; but we notified them not to pay it to Malony as I was half owner there.

Q. Did they come to you to get permission to go in there? A. No, sir.

Q. They got possession from Malony, didn't they?

A. Yes, sir.

Q. And you knew that? A. Yes, sir.

Q. And the case of Mr. Malony wasn't settled until in 1897? A. 1896 or 1897, I believe.

Q. The first time you had possession of the property was when you took possession under the writ of possession in 1897? A. Yes, sir; I think so.

By Mr. HEID.—I will now have to take the stand and testify that I delivered this ontice to the defendants, Mr. Cobb, unless you will admit that it was delivered.

By Mr. COBB.—My objection is that it is irrelevant and immaterial, and if the Court overrules that objection, we will then admit that it was delivered.

By the COURT.—I will admit it for what it is worth.

I am not sure that it is relevant or material, but it may go in.

By Mr. HEID.—Gentlemen of the Jury, the notice which I served, as is admitted by the defendants, reads as follows:

Plaintiff's Exhibit "G."

Duplicate Original. Juneau, Alaska, April 23d, 1894.

(Plaintiff's Exhibit "J," Adsit vs. Kaufman Bros.—Retrial.)

Messrs. Toklas & Kaufman, Juneau, Alaska.

You are hereby notified that O. H. Adsit, Esq., of Juneau, Alaska, is the owner of an undivided one-half part or interest of, in, and to lot numbered four (4) in block numbered four (4), in the town of Juneau, Alaska, being the premises now occupied by you under the business name of "The New York Store"; and you are hereby requested to pay to said Mr. O. H. Adsit, the one-half of all the rent due from you for said premises and the occupation thereof by you, and to pay such rent to no one excepting to the said Mr. Adsit, unless upon the written order signed by said Mr. Adsit.

Very respectfully,

JOHN G. HEID,

Attorney for O. H. Adsit.

I will now have this marked Plaintiff's Exhibit "G," in case No. 75A.

(So marked.)

By Mr. HEID.—Now, if the Court please, I offer in evidence receipts and papers to show defendants were in possession during the time mentioned, of this property of Mr. Adsit's, and I will also take the stand on that point if necessary.

By Mr. COBB.—My impression is we admit in the answer that we were in the possession of that building during the time mentioned. I don't think we denied it, because we couldn't.

Plaintiff rests.

By Mr. COBB.—Defendants now move the Court to instruct the jury to return a verdict in favor of the defendants, on the ground that the evidence conclusively shows that the defendants occupied the premises in controversy under another holding adversely to the plaintiff, and not by permission of the plaintiff; and that the relation of landlord and tenant never existed between plaintiff and defendants either by express or implied contract.

After argument by counsel at length,

The COURT said:

A tenant is one who occupies the lands or premises of another in subordination to that other's wish, and with his assent either express or implied; but in order to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, per se, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title, but without his assent, he is a

mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

Where a person goes into possession wrongfully, it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of trespasser to that of a tenant. In such a case, the contract must be explicit, and embrace all the elements previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of trespasser to that of a tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these

parties to continue in the occupation of his premises, provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it; if there must be the assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery. (Court was here interrupted by counsel.)

Now, Mr. Heid, the only question in my mind is this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. You may, under proper circumstances, waive the tort—the wrongful taking or detention of the premises—and sue on an implied contract. For example, if a man steals my horse, I need not pursue him in tort. I may waive the tort and sue for the value of the horse upon an implied promise on the part of the thief to pay for what he takes from me. That is the only theory upon which this action could be maintained in the condition it now is.

When this case was up before, my curiosity was somewhat excited because the very defense that is now presented here was not presented in that action. It seemed to me then, that the action could not be maintained in

the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages were not alleged. I simply say that on the face of this judgment, there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

And despite the fact as it appears from the evidence, that Mr. Adsit hasn't been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

Gentlemen of the Jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendants; and I do this on the theory

that in the action as brought, and under the facts as proved, the plaintiff has on right to a recovery. You may select one of your number as foreman—I will select Mr. Rose, as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendants.

(To which instruction, in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

I hereby certify the foregoing twenty-four pages of typewritten matter constitute a true transcript of the testimony and proceedings at the trial of said cause.

_____,

Reporter.

Dated at Skaguay, Alaska, April 18, 1902.

FEES.

1.	Original copy....	$18.00
2.	Duplicates....	7.20

O. H. ADSIT,

Plaintiff,

vs.

No. 75A.

G. KAUFMAN,

Defendant.

Verdict.

We, the jury, selected, impaneled, and sworn in the above-entitled cause, find for the defendant.

A. M. ROSS,

Foreman

To all of which plaintiff by counsel excepts. Whereupon the jury was excused from further consideration of this cause.

In the United States District Court, for the District of Alaska, Division No. 1.

OHLIN H. ADSIT,

Plaintiff,

vs.

No. 75A.

G. KAUFMAN,

Defendant.

Motion for New Trial.

(January 17, 1902.)

Comes now the plaintiff in the above-entitled action, by his attorney, John G. Heid, and moves the Court for a new trial of the above-entitled action; this motion is based upon the facts that in the trial of the above cause, errors in law, which were excepted to by plaintiff, were made by the Court, as follows:

1. In ruling out and refusing to admit in evidence the deed from William J. Thompson and wife to O. H. Adsit, the plaintiff herein, conveying to said Adsit his interest of, in, and to the premises occupied by said defendant.

2. The Court erred further in refusing to submit the case to the jury.

3. The Court further erred in peremptorily instructing the jury to return a verdict for the defendant.

4. In ruling that the plaintiff cannot recover of and from the defendant for the use and occupation of the

premises by said defendant, and described in the complaint herein.

JOHN G. HEID,
Attorney for Plaintiff.

Thereafter, to wit, on the 3d day of February, 1902, the Court made the following order:

O. H. ADSIT
vs.
G. KAUFMAN, } No. 75A.

Order Overruling Motion for New Trial.

On this day this cause coming on to be heard on motion of plaintiff for a new trial herein, and the Court being fully advised in the premises, overrules said motion of plaintiff, to which order and ruling of the Court plaintiff by counsel excepts.

And on the same day, to wit, the said 3d day of February, 1902, the Court rendered and entered its judgment herein, as follows:

OHLIN H. ADSIT, Plaintiff,
vs.
G. KAUFMAN, Defendant. } No. 75A.

Judgment.

On this 3d day of February, 1902, this cause came on to be heard upon the motion of the plaintiff to set aside the verdict of the jury herein, and to grant him a new

trial; Mr. John G. Heid, appearing for said motion, and Messrs, Maloney & Cobb, contra, and the Court, having heard said motion, and the argument of counsel, and being fully advised in the premises, is of the opinion that the law is for the defendant.

It is therefore considered by the Court, and it is so ordered and adjudged, that said motion be, and the same is hereby in all things overruled and denied, to which ruling of the Court the plaintiff then and there excepted.

Upon motion of Messrs. Maloney & Cobb for judgment upon the verdict for the defendant herein—

It is considered by the Court, and so ordered and adjudged, that the plaintiff, Ohlin H. Adsit, take nothing by his action herein; that the defendant, G. Kaufman, go hence without day, and that he have and recover of and from the plaintiff, Ohlin H. Adsit, all costs in this behalf incurred, to be taxed by the clerk, for which let execution issue.

For Identification, Plaintiff's Exhibit No. 1 (Ruled Out).

Know all men by these presents, that we, William J. Thompson, and Ellen W. Thompson, wife of said Wm. J. Thompson, both of the city of Tacoma, Washington, in consideration of five dollars, to us paid by Ohlin H. Adsit, of the town of Juneau, District of Alaska, do hereby grant, bargain, sell, remise, release and forever quitclaim unto the said Ohlin H. Adsit, and unto his heirs and assigns all of our right, title and interest in and to the following described parcel of land, situate in the said town of Juneau, and District of Alaska, to wit: An undivided one-half (½) part or interest of, in, and to

lot numbered four (4), in block numbered four (4), as per plat and survey of said town made by G. C. Hanus, accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska; together with an undivided one-half part or interest of, in, and to all buildings and improvements thereon situated and erected.

To have and to hold the same, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining unto said Ohlin H. Adsit, and unto his heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [Seal]
ELLEN W. THOMPSON. [Seal]

Signed, sealed and delivered in presence of:

J. M. BROWN,
DANIEL SINCLAIR.

United States,
District of Alaska. } ss.

This certifies, that on this 24th day of March, A. D. 1894, before me, the undersigned, a county clerk, in and for the said District, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes herein mentioned.

And that Ellen W. Thompson, wife of said William J. Thompson, on examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily, and without fear, coercion or compulsion from anyone.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal of Superior Court] J. M. BROWN,
County Clerk and Clerk of the Superior Court.

The foregoing bill of exceptions is correct, and it is hereby agreed that same may constitute a part of the record and be certified to the Circuit Court of Appeals of the United States for the Ninth Circuit, and there be used as a bill of exceptions in this case.

JOHN G. HEID,
Attorney for Plaintiff.

MALONY & COBB,
Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled, approved, and allowed, and ordered to be made part of the record in this cause.

MELVILLE C. BROWN,
Judge.

[Endorsed]: In United States District Court, for Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Bill of Exceptions. Presented this 28th April, A. D. 1902. M. C. Brown, Judge. Filed May 8, 1902. W. J. Hills, Clerk.

In the United States District Court, for the District of Alaska, Division No. 1.

OHLIN H. ADSIT,

Plaintiff,

vs.

No. 75A.

G. KAUFMAN,

Defendant.

Assignment of Errors.

And now, to wit, on the 25th day of June, 1902, comes the said plaintiff, Ohlin H. Adsit, by John G. Heid, his attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this:

1.

That the United States District Court, for the District of Alaska, Division No. 1, before which said matter was tried, erred in ruling out and refusing to admit in evidence the deed from William J. Thompson and Ellen W. Thompson, his wife, to said Ohlin H. Adsit, the plaintiff herein, conveying to said plaintiff, Ohlin H. Adsit, an undivided one-half part or interest of, in, and to lot numbered four (4), in block numbered four (4), in the town of Juneau, Alaska, together with all improvements thereon; being the premises occupied by the defendant, G. Kaufman, herein, and which said deed was executed and delivered by said Thompson and wife, to said plaintiff, Ohlin H. Adsit, as is set forth in the bill of excep-

tions, approved, settled herein by the Court, and which said deed is as follows:

"Know all men by these presents, that we, William J. Thompson, and Ellen W. Thompson, both of the city of Tacoma, Washington, in consideration of five dollars, to us paid by Ohlin H. Adsit, of the town of Junea, District of Alaska, do hereby grant, bargain, sell, remise, release and forever quitclaim unto the said Ohlin H. Adsit and unto his heirs and assigns all our right, title and interest in and to the following described parcel of land, situate in the said town of Juneau, and District of Alaska, to wit: An undivided one-half (½) part or interest of, in and to lot numbered four (4), in block numbered four (4), as per plat and survey of said town made by G. C. Hanus, accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska. Together with an undivided one-half part or interest, of, in, and to all buildings and improvements thereon situated and erected.

To have and to hold the same, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, unto said Ohlin H. Adsit, and unto his heirs and asigns forever.

In witness whereof, we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [Seal]
ELLEN W. THOMPSON. [Seal]

Signed, sealed and delivered in presence of:

J. M. BROWN,
DANIEL SINCLAIR.

United States,
District of Alaska. } ss.

This certifies, that on this 24th day of March, A. D. 1894, before me, the undersigned, a county clerk, in and for the said District, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes herein mentioned.

And that Ellen W. Thompson, wife of said William J. Thompson, on examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily and without fear, coercion, or compulsion from anyone.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal of Superior Court] J. M. BROWN,
County Clerk and Clerk of the Superior Court."

2.

That the United States District Court, for Alaska, Division No. 1, erred in the opinion and decision given in the presence of the jury upon the defendant's motion to direct a verdict in favor of the defendant, as is set forth in said bill of exceptions, as follows:

"A tenant is one who occupies the lands or premises of another in subordination to that other's wish, and with his assent, either express or implied; but in order

to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, per se, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title but without his assent, he is a mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

"Where a person goes into possession wrongfully, it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of a trespasser to that of tenant. In such a case, the contract must be explicit, and embrace all the elements previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of a trespasser to that of a tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

"Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these parties to continue in the occupation of his premises provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it; if there must be assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery.

"Now, Mr. Heid, the only question in my mind is this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. That you may, under proper circumstances, waive the tort, the wrongful taking or detention of the premises, and sue on an implied contract: For example, if a man steals my horse I need not pursue him in tort. I may waive the tort and sue for the value of the horse on an implied promise on the part of

the thief to pay for what he takes from me. That is the only theory upon which this could be maintained in the condition it now is.

"When this case was up before, my curiosity was somewhat excited, because the very defense that is now presented here was not presented in that action. It seemed to me then that the action could be maintained in the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat, is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages are not alleged. I simply say that on the face of this judgment, there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

"And despite the fact as it appears from the evidence, that Mr. Adsit hasn't been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

"Gentlemen of the jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendant, and I do this on the theory that in the action as brought and under the facts as proved, the plaintiff has no right to a recovery. You may select one of your number as foreman—I will select Mr. Rose as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendant."

(To which instruction, and in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

3.

That the said United States District Court erred in granting the defendant's motion to direct the jury to return a verdict for the defendant, as set forth in paragraph 2 of the "Assignment of Errors."

4.

That the United States District Court aforesaid erred in denying the plaintiff's motion to grant a new trial upon the grounds of manifest errors set forth in said motion, as appears upon the records thereof.

5.

That the said United States District Court for Alaska, Division No. 1, erred in entering a judgment in favor of the defendant and in dismissing the action of plaintiff,

instead of entering a judgment in favor of plaintiff as prayed for in his complaint.

Wherefore, the said Ohlin H. Adsit prays that the judgment of the said United States District Court, for the District of Alaska, Division No. 1, be reversed, and said United States District Court for Alaska, Division No. 1, be ordered to enter a judgment for the plaintiff.

JOHN G. HEID,

Attorney for said Ohlin H. Adsit, Plaintiff in Error, Juneau, Alaska.

[Endorsed]: No. 75A. In United States District Court, at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Assignment of Errors. Filed June 26, 1902. W. J. Hills, Clerk.

In the United States District Court, at Juneau, for the District of Alaska, Division No. 1.

OHLIN H. ADSIT, Plaintiff,

vs.

G. KAUFMAN, Defendant.

No. 75A.

Petition for Writ of Error.

To the Honorable MELVILLE C. BROWN, Judge of the United States District Court, for the District of Alaska, Division No. 1.

The petition of Ohlin H. Adsit respectfully shows to the Court, as follows:

That your petitioner is the plaintiff in the above-entitled cause; that in the said cause there was entered at the December, 1901, term of this court, held at Juneau, Alaska, in Division No. 1, a final judgment in favor of the defendant herein, adjudging the said plaintiff not entitled to recover of and from the defendant the sum of money sued for, to the prejudice and injury of your petitioner; which said judgment and proceedings incident thereto are erroneous in many particulars to the great inury and prejudice of the complainant, your petitioner.

That manifest errors have been made in this cause in the rendering of said judgment to the great damage of this complainant, your petitioner, as same fully appears from the bill of exceptions, filed in said cause, and assignment of errors filed herewith.

Wherefore, that in order for your petitioner to obtain relief in the premises, and for an opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause; and that upon the giving, by your petitioner, a bond as required by law, all proceedings in this Court be suspended and stayed until the determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Judicial District.

And that a transcript of the records, proceedings and all papers in this cause, duly authenticated, may be transmitted to the Honorable Circuit Court of Appeals, for the Ninth Judicial Circuit of the United States, hold-

ing term at San Francisco, State of California, to determine said writ of error.

Dated, Juneau, Alaska, June 23d, 1902.

OHLIN H. ADSIT.

[Endorsed]: No. 75A. In United States District Court at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Petition for Writ of Error. Filed June 24, 1902. W. J. Hills, Clerk.

In the United States District Court, for the District of Alaska, Division No. 1.

OHLIN H. ADSIT, Plaintiff

vs.

G. KAUFMAN, Defendant.

No. 75A.

Bond on Writ of Error.

Know all men by these presents, that we, Ohlin H. Adsit, plaintiff in error in the above-entitled cause, as principal, and V. McFarland, of the town of Juneau, Alaska, as surety, are held and firmly bound unto the above-named G. Kaufman, defendant in error, in the above-entitled action, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said G. Kaufman, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, exec-

utors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of June, 1902.

Whereas, the above-named Ohlin H. Adsit is about to sue out a writ of error in the above-named court, to re-examine and reverse in the Circuit Court of Appeals of the United States of America for the Ninth Circuit, the judgment rendered in the above-entitled action by the said District Court of the United States for the District of Alaska, Division No. 1, and to obtain an order and judgment of the said Circuit Court of Appeals, that the plaintiff have judgment entered in this Court as prayed for in the complaint filed herein, and that plaintiff have a new trial of his said action in said District Court of the United States for the District of Alaska, Division No. 1.

Now, therefore, the condition of this obligation, is such that if the above-bounden Ohlin H. Adsit, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make said writ of error good, and shall obey all judgments and orders entered against him in the said Circuit Court of Appeals, under and upon his said writ of error, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

OHLIN H. ADSIT.
V. McFARLAND.
JOHN G. HEID.

Executed in the presence of:

United States of America,
District of Alaska. } ss.

V. McFarland, being duly sworn, deposes and says that he is the surety named in and who executed the foregoing bond; that he is a resident and householder within the District of Alaska, and is worth the sum of five hundred dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

V. McFARLAND.

Subscribed and sworn to before me this 25th day of June, 1902.

[Notarial Seal] JOHN G. HEID,
Notary Public for Alaska.

The foregoing bond is hereby approved as to form, sufficiency of surety, and manner of execution.

M. C. BROWN,
Judge.

[Endorsed]: No. 75A. In United States District Court, at Juneau, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Bond on Writ of Error. Filed June 26, 1902. W. J. Hills, Clerk.

And afterwards, to wit, on the 21st day of June, 1902, the following further proceedings were had and appear of record in said cause, to wit:

O. H. ADSIT
vs.
G. KAUFMAN } No. 75A.

Order Extending Time to Perfect Writ of Error.

Now, on this day, upon application of counsel for plaintiff herein, it is ordered that plaintiff be given ninety days in which to perfect his writ of error herein.

Clerk's Certificate to Transcript.

United States of America,
District of Alaska, } ss
Division No. 1.

I, W. J. Hills, clerk of the United States District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereto annexed forty-nine pages, are a full, true and correct transcript of the records and files of all the proceedings in the therein mentioned cause of Ohlin H. Adsit vs. G. Kaufman, as the same appears of record and on file in my office, and that the same is inaccordance with the command of the writ of error in cause allowed; that this transcript has been prepared by the plaintiff in error, out of this office by permission of the Court. I further

certify that the costs of examination and certificate, amounting to $6.35, has been paid to me by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and caused the seal of Court to be hereunto affixed at Juneau, Alaska, on this 16th day of July, 1902.

[Seal] W. J. HILLS,
Clerk United States District Court for District of Alaska, Division No. 1.

By J. J. Clarke,
Deputy.

[Endorsed]: No. 866. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ohlin H. Adsit, Plaintiff in Error, vs. G. Kaufman, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed July 24, 1902.

F. D. MONCKTON,
Clerk.

No. 866

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OHLIN H. ADSIT,

Plaintiff in Error,

vs.

G. KAUFMAN,

Defendant in Error.

Brief for Plaintiff in Error.

ALFRED SUTRO,

Attorney for Plaintiff in Error.

Filed October 23d, 1902.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

JOHN PARTRIDGE, STATIONER AND PRINTER, 306 CAL'A ST., S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT, *Plaintiff in Error,* vs. G. KAUFMAN, *Defendant in Error.*	No. 866.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This action was brought to recover the sum of $650., for the use and occupation for twenty-six months at $50. per month, of an undivided one-half interest in the premises known as Lot No. 4, in Block No. 4, in the town of Juneau, Alaska. It is contended by the plaintiff (Tr., p. 8), and it is admitted by the defendant, that the defendant used and occupied the premises for

twenty-six months, to wit: From April 1, 1894, to July 1, 1896 (Tr., p. 10); but the defendant denies that he is indebted to the plaintiff in any sum for such use and occupation (Tr., p. 10). On April 23, 1894, the plaintiff caused to be served on the defendant a notice to the effect that the plaintiff was the owner of an undivided one-half of the premises, and demanding payment of half the rent. The notice was as follows:

" Messrs. Toklas & Kaufman,
Juneau, Alaska.

You are hereby notified that O. H. Adsit, Esq., of Juneau, Alaska, is the owner of an undivided one-half part or interest of, in, and to lot numbered four (4) in block numbered four (4), in the town of Juneau, Alaska, being the premises now occupied by you under the business name of 'The New York Store'; and you are hereby requested to pay to said Mr. O. H. Adsit the one-half of all the rent due from you for said premises and the occupation thereof by you, and to pay such rent to no one excepting to the said Mr. Adsit, unless upon the written order signed by said Mr. Adsit.

Very respectfully,
JOHN G. HEID,
Attorney for O. H. Adsit." (Tr., p. 40.)

In 1896 the plaintiff herein brought suit in the United States District Court for the District of Alaska against one John F. Malony, for an undivided one-half of said lot Number 4 (Tr., pp. 21-23). In that action the Court found that on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of said lot and that plaintiff is the owner of an undivided one-half thereof. (Tr., pp. 33 and 34.)

Judgment was accordingly entered that plaintiff was the true and lawful owner of the undivided one-half of said lot. (Tr., pp. 17 and 18.) (Upon appeal to the Supreme Court of the United States this judgment was affirmed. *Malony* v. *Adsit*, 175 U. S., 281.) Thereupon plaintiff brought this action to recover from the defendant the sum of $650., being for one-half of the reasonable value of the use and occupation of the premises by the defendant from April 1, 1894, to July 1, 1896, at the rate of $50. per month. It was proved that $50. per month was the reasonable value of the use and occupation of the premises (Tr., pp. 36–38). The defendant claimed that he held possession under John F. Malony (Tr., p. 39), being the same person against whom plaintiff brought suit for an undivided one-half of the premises.

At the close of the plaintiff's testimony the defendant moved the Court to instruct the jury to return a verdict in favor of the defendant (Tr., p. 41). The Court granted this motion upon the theory that the notice given by plaintiff to defendant was of no effect; that the relation of landlord and tenant did not exist between them, and that the defendant occupied the premises as tenant of Malony (Tr., pp. 41-44). The jury returned a verdict as directed (Tr., p. 45), and judgment was accordingly entered (Tr., pp. 47, 48). To all of which plaintiff duly excepted.

The errors relied upon for a reversal of this judgment are contained in the following specification :

Specification of the errors relied upon.

FIRST: That the United States District Court for Alaska, Division No. 1, erred in the opinion and decision given in the presence of the jury upon the defendant's motion to direct a verdict in favor of the defendant, as is set forth in said bill of exceptions, as follows:

"A tenant is one who occupies the lands or premises of another in subordination to that other's wish, and with his assent, either express or implied; but in order to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, per se, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title but without his assent, he is a mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

"Where a person goes into possession wrongfully,

it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of a trespasser to that of tenant. In such a case the contract must be explicit, and embrace all the elements, previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of a trespasser to that of tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

"Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these parties to continue in the occupation of his premises provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it, if there must be assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery.

"Now, Mr. Heid, the only question in my mind is

this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. That you may, under proper circumstances, waive the tort, the wrongful taking or detention of the premises, and sue on an implied contract: For example, if a man steals my horse I need not pursue him in tort. I may waive the tort and sue for the value of the horse on an implied promise on the part of the thief to pay for what he takes from me. That is the only theory upon which this could be maintained in the condition it now is.

"When this case was up before my curiosity was somewhat excited, because the very defense that is now presented here was not presented in that action. It seemed to me then that the action could be maintained in the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that

the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages are not alleged. I simply say that on the face of this judgment there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

"And despite the fact as it appears from the evidence, that Mr. Adsit hasn't been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

"Gentlemen of the jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendant, and I do this on the theory that in the action as brought and under the facts as proved, the plaintiff has no right to a recovery. You may select one of your number as foreman—I will select Mr. Rose as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendant."

(To which instruction, and in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

SECOND: That the said United States District Court erred in granting the defendant's motion to direct the jury to return a verdict for the defendant, as set forth in paragraph 2 of the "Assignment of Errors."

THIRD: That the said United States District Court for Alaska, Division No. 1, erred in entering a judgment in favor of the defendant and in dismissing the action of plaintiff, instead of entering a judgment in favor of plaintiff as prayed for in his complaint.

ARGUMENT.

1. The defendant is liable to the plaintiff under an implied agreement to pay a reasonable sum for the use and occupation of the premises.

It is not necessary that there should be an express contract for the payment of rent for the use and occupation of premises. A liability to pay a reasonable sum for such use and occupation may be founded upon an implied agreement.

Oakes v. *Oakes*, Adm., 16 Ill., 106.

In that case the Court said :

"There is no evidence of an express contract for rent, nor is there any evidence that the defendant's intestate was a trespasser or intruder upon the land, or that he in any way held it against the will of the owner, nor is it shown that there was any agreement or understanding that the tenant was to enjoy the land without rent. Under such circumstances the

law will infer an implied agreement to pay a reasonable rent for the premises."

In *Chambers* v. *Ross*, 25 N. J. L., 293, the Court said :

" There was no express contract between the parties, and none was necessary. The law will imply a contract to pay rent from the mere fact of occupation, unless the character of the occupancy be such as to negative the existence of a tenancy. The action for use and occupation does not necessarily suppose any demise. *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp., 467; *Hull* v. *Vaughan*, 6 Price, 157; 2 Saund. Pl. & Ev. 890 ; Chitty on Cont., 332."

Do the facts and circumstances surrounding the parties in this case establish an implied agreement on the part of the defendant to pay a reasonable sum for the use and occupation of the premises involved in this action? Plaintiff contends that they most certainly do. The defendant went into the possession of certain premises ; the plaintiff chose to waive the tortious act of defendant's taking possession without his permission and to regard the defendant as his tenant. This he could do. See *Welch* v. *Bagg*, 12 Mich., 41; *Catterlin* v. *Spinks*, 16 Ala., 467; *Phelps* v. *Church*, etc., 99 Fed., 683. He at once gave notice of his ownership of one-half of the premises to the defendant and that the defendant should pay him one-half of the rent. *The defendant continued in possession of the premises after receipt of the notice, without any act or claim of adverse right, or inconsistent with an acknowledgment and full recognition of the plaintiff as the rightful owner of the undivided one-half interest.* These facts we

submit fully and completely establish an implied agreement on the part of defendant to pay plaintiff one-half of the value of the use and occupation of the premises, based upon a recognition of plaintiff's claim of ownership. Had defendant by any act controverted plaintiff's title, then the defense he has interposed would be sound. *Jackson* v. *Mowry*, 30 Ga., 143. The mere fact that defendant paid another who claimed to be the owner of the premises, without in anywise notifying the plaintiff of such payment, is no defense to an action by the plaintiff, who is the real owner. *Cross* v. *Freeman*, 54 S. W., 246. *No act of the defendant could possibly be construed into a claim of possession adverse to the plaintiff. The theory upon which the trial court decided this case is based upon that of adverse possession. But here there was no adverse possession.* The defendant was not a trespasser; plaintiff chose to treat him as his tenant and he did not object. If the position of the defendant in this action were sound, then the owners of property would be at the mercy of fraudulent lessors and over-credulous lessees. Suppose Smith went to Johnson and said: "I am the owner of the Cliff House in San Francisco and will let the same to you for $1,000 per month"; whereas, in fact, the Cliff House belongs to Brown. Johnson, who is a responsible person, takes possession of the Cliff House, and Brown at once gives notice to Johnson of his ownership and of his claim for the rent. Notwithstanding the notice, Johnson remains in possession, neither disputes nor makes

any claim of adverse title to Brown's claim of ownership, pays no attention to the notice, and,without any word to Brown, pays the rent to Smith. Brown, who is satisfied with Johnson as a tenant, suffers him to remain in possession for two years and then brings action against him for the value of the use and occupation of the premises. Could Johnson contend that the payment of the rent to Smith was a defense to the action? It is true that a tenant cannot dispute the title of his landlord; but this rule is founded, like all other rules of law, upon common sense, and in this instance it is that a tenant has satisfied himself of his landlord's title before he assumes possession of the proffered premises and places himself in a position in which he cannot deny his lessor's title. Had the defendant in the case at bar exercised ordinary diligence and prudence upon receipt of the notice from plaintiff, he would have discovered that his lessor was not the full owner of the premises. If he thought that there was a dispute over the ownership of the property which he did not care to determine by paying one-half of the rent to each claimant, he should, as an ordinarily prudent business man, either have refused to use and occupy the premises, or he should have availed himself of the adequate and ample remedy provided by law, of paying the amount of the value of the use and occupation of the premises into court to be interpleaded by the rival claimants. *Instead, he remained absolutely silent. His silence implied a consent to remain in possession of the premises pursuant to the terms of the*

notice; the relation of landlord and tenant became fully established by implication, and the defendant, we submit, became liable to pay the plaintiff for one-half of the full value of the use and occupation of the premises.

2. The defendant is estopped from denying his liability to the plaintiff.

The defendant, by retaining possession of the premises after the receipt of notice from plaintiff, and by failing to dispute plaintiff's claim, led the plaintiff to believe that his claim was recognized and that he would receive one-half of the rent. Defendant, by reason of his silence and his acquiescence, is now estopped from asserting a claim and contention which he should have made promptly upon receipt of the notice. *He tacitly encouraged the plaintiff to believe that his demand for one-half of the rental value of the premises would be honored; his conduct induced the plaintiff to refrain from taking any steps to enforce his claim for rent.* Defendant cannot now change his position so as to pecuniarily prejudice the plaintiff.

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain v. *Seamens*, 9 Wall. 254, 274.

See also: *Pokegama etc. Co.* v. *Klamath River, etc. Co.*, 96 Fed. 34, 54.

Horton v. *Mercer*, 71 Fed. 153.

Allen West Co. v. *Patillo*, 90 Fed. 628.
Scott v. *Jackson*, 89 Cal. 258.

If the defendant claimed that payment of rent to Malony, under whom he professed to hold the premises, was in full satisfaction of his obligation to pay rent,why did he not so state to the plaintiff when the notice was served? It would have been a very easy and simple matter for him to have answered the notice given him by the plaintiff and to have told the plaintiff that he did not recognize his claim of ownership. Plaintiff would then have taken such steps as he might have been advised to enforce his claim of ownership to the premises. Instead he relied, as he had a right to do, upon defendant's acquiescence in and recognition of his claim of ownership. Under these circumstances we submit that *the defendant is estopped from denying that the plaintiff is entitled to one-half the value of the use and occupation of the premises.*

It is respectfully submitted that the judgment should be reversed and that the plaintiff should have judgment for $650., with interest at eight per cent. per annum from July 1, 1896, and for his costs.

ALFRED SUTRO,

Attorney for Plaintiff in Error.

Dated, San Francisco, October 23, 1902.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT,
Plaintiff in Error,
vs
G. KAUFMAN,
Defendant in Error.

No. 866.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

MALONY & COBB.
Attorneys for Defendant in Error.

Daily Dispatch Print, Juneau.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT,
Plaintiff in Error,
vs
G. KAUFMAN,
Defendant in Error.

No. 866.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error has not served his brief at this time, and should the same be served hereafter, within the time required by the rule, it will be too late then to brief the case for the defendant in error before the submission day. We therefore proceed to show why the judgment of the lower court should be affirmed.

There are five assignments of error. The first (Rec. p. 51) complains of the action of the court in excluding from the jury the deed from Thompson and wife to O. H. Adsit. We object to the consideration of this assignment because the

point was not saved by any proper exception in the bill. (Rec. pp. 18 to 20.) Nothing is shown in the bill upon which the court could say that the objection was wrongly sustined, and this defect is not supplied by what is set out in the assignment.

But if the assignment is entitled to be considered, then it should be overruled. The deed was not proved as at common law, and was not acknowledged as required by law. This is evident from the record p. 20. But this ruling is wholly immaterial in any event, as will be shown by a consideration of the case made, and the ruling of the court upon the pivotal question therein.

The action was to recover rents alleged to be due and owing plaintiff, Adsit, by the defendant, Kaufman, for the use and occupation of an undivided half interest in Lot 4, Block 4, of the town of Juneau, from April 1st, 1894, to July 1st, 1896, by permission of the plaintiff, who thereby became liable to pay him the reasonable value of such premises, viz: $650. (Rec. pp. 7-9).

The answer admitted the present ownership of plaintiff; but denied his ownership during the time mentioned; it admitted that defendant occupied the premises during the time alleged, but specially denied that it was by permission of the plaintiff, or under him, or in recognition of his title, but that during said time, said premises were in possession of another person of whom defendant rented, and who claimed adversely to Adsit. [Rec. pp. 9-10.] The reply denied this. [Rec. p. 13.]

It will thus be seen that the action was upon an implied contract; that the answer put in issue this implied contract, and set up occupancy of the premises under a contract with another, and this was put in issue by the reply.

The evidence showed that in April, 1894, J. F. Malony was

in possession of the premises mentioned and rented the same to Kaufman, the defendant. That at that time there was a suit pending in the District Court of Alaska for the possession of said premises, wherein O. H. Adsit was plaintiff and J. F. Malony was defendant; that the plaintiff prevailed in said action, and in 1897 obtained possession under said judgment. John G. Heid, as attorney for Adsit, served a notice on Toklas & Kaufman to pay the rent to Adsit. When this notice was served is not shown. (Rec. p. 40.) Mr. Adsit testified that the defendant never got permission from him to occupy the premises; that defendant rented of Malony; that he never rented to defendant, and that he never had possession of the premises at any time until 1897. (Rec. p. 39.)

Under this evidence the court instructed the jury to find for the defendant, and this ruling is the matter complained of in the other assignments of error.

The action of the lower court was manifestly right, both in principle and authority. If Kaufman had paid the rent to Adsit, he would still have been liable to Malony of whom he rented; for a tenant cannot dispute his landlord's title. If Adsit had sued Kaufman for the possession of the property and damages for withholding, as he might have done, Kaufman could have vouched in Malony, his landlord, and stepped out of the case. But the action of Adsit was against Malony, the real party who was withholding his property. He did no ask for damages for withholding the possession, however. Had he done so, improvements could have been set off against the damages. He waits until he has ousted Malony and then seeks to compel Kaufman to pay his rent a second time.

But this was not the question ruled by the trial court. That question was: Can one suing upon an implied contract recover upon proof of a tort?

Dixon vs. Ahern, 24 Pac. Rep., 598, and S. C., 24 Pac. Rep., 337, is on all fours with the case at bar. There it was held

that to recover for use and occupation of lands, it is necessary to show that the relation of landlord and tenant existed between the parties during the time of the occupation. A mere trespasser cannot be held liable in such an action. See also—

Pico vs. Phelan, 19 Pac. Rep., 186. (California.)

Espey vs. Fenton, 5 Ore., 423.

Lloyd vs. Hough, 1 How., 153.

Hill vs. United States, 149 U. S., 593.

These authorities could be greatly multiplied, but we do not deem it necessary to burden the Court with further citations. We respectfully submit that the judgment of the lowert court should be affirmed.

MALONY & COBB.
Attorneys for Defendant in Error.